

No. 89-64 J-CFX  
Status: GRANTED

Title: Manuel Lujan, Jr., Secretary of the Interior, et al., Petitioners  
v.  
National Wildlife Federation, et al.

Docketed:

October 18, 1989

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Roberts Jr., John G., Pendley, William Perry

Counsel for respondent: Prettyman Jr., E. Barrett, Dean Jr., Norman L.

Entry	Date	Note	Proceedings and Orders
1	Sep 6 1989	G	Application (A89-197) to extend the time to file a petition for a writ of certiorari from September 18, 1989 to October 18, 1989, submitted to The Chief Justice.
2	Sep 7 1989		Application (A89-197) granted by the Chief Justice extending the time to file until October 18, 1989.
3	Oct 6 1989	D	Application (A89-197) to extend further the time to file a petition for a writ of certiorari from October 18, 1989 to October 28, 1989, submitted to Justice Rehnquist.
4	Oct 11 1989		Application (A89-197) denied by Justice Rehnquist.
5	Oct 18 1989	G	Petition for writ of certiorari filed.
6	Oct 18 1989		Appendix of petitioner filed.
7	Nov 3 1989		Application (A89-340) to file a brief in opposition to the petition in excess of page limits, submitted to The Chief Justice.
8	Nov 9 1989		Application (A89-340) granted by the Chief Justice, allowing a maximum of 40 pages.
10	Nov 9 1989		Order extending time to file response to petition until December 8, 1989.
11	Dec 7 1989		Brief amici curiae of American Mining Congress filed. VIDED.
12	Dec 8 1989		Brief amici curiae of Natl. Cattlemen's Assn., et al. filed.
13	Dec 8 1989		Brief of respondent National Wildlife Federation in opposition filed. VIDED.
15	Dec 8 1989	G	Motion of American Farm Bureau Federation, et al. for leave to file a brief as amici curiae filed.
14	Dec 13 1989		DISTRIBUTED. January 5, 1990
16	Dec 27 1989	X	Reply brief of petitioner Lujan, Secretary of Interior filed.
18	Jan 8 1990		REDISTRIBUTED. January 12, 1990
19	Jan 16 1990		Motion of American Farm Bureau Federation, et al. for leave to file a brief as amici curiae GRANTED. Justice O'Connor OUT.
20	Jan 16 1990		Petition GRANTED. *****
21	Jan 16 1990		See 89-628 for some of the earlier filed briefs.
22	Feb 23 1990		SET FOR ARGUMENT MONDAY, APRIL 16, 1990. (1ST CASE)
28	Feb 26 1990		Record filed.
		*	Certified copy of original record and proceedings, 6

Entry	Date	Note	Proceedings and Orders
		boxes, received.	
23	Mar 1 1990	Brief amicus curiae of American Mining Congress filed.	
		VIDED.	
24	Mar 1 1990	Brief amicus curiae of Pacific Legal Foundation filed.	
25	Mar 2 1990	Brief of respondents Mountain States Legal Foundation, et al. in support of petition filed.	
26	Mar 2 1990	Brief of petitioners Manuel Lujan, Jr., Sec. of Interior, et al. filed.	
27	Mar 2 1990	Joint appendix filed.	
29	Mar 2 1990	Brief amici curiae of Washington Legal Foundation, et al. filed.	
30	Mar 2 1990	Brief amici curiae of American Farm Bureau Federation, et al. filed.	
31	Mar 2 1990	Brief amici curiae of Natl. Cattlemen's Assn., et al. filed.	
32	Mar 23 1990	CIRCULATED.	
33	Apr 2 1990	X Brief amici curiae of The Wilderness Society, et al. filed.	
34	Apr 2 1990	X Brief of respondent National Wildlife Federation filed.	
35	Apr 2 1990	X Brief amici curiae of California, et al. filed.	
36	Apr 6 1990	X Reply brief of petitioner Manual Lujan, Jr. filed.	
38	Apr 13 1990	P Motion of the State of Wyoming to withdraw from participation as amicus curiae in the brief filed by State of California filed.	
37	Apr 16 1990	ARGUED.	

89-640

No.

Supreme Court, U.S.

FILED

OCT 18 1989

CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1989

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,  
ET AL., PETITIONERS

v.

NATIONAL WILDLIFE FEDERATION, ET AL.

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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## **QUESTIONS PRESENTED**

1. Whether, in a lawsuit challenging a vast array of government decisions affecting the use or disposition of approximately 180,000,000 acres of public land, an environmental organization may establish its standing to sue by relying on an affidavit asserting that one member of the organization makes use of property "in the vicinity of" a particular 2,000,000 acre parcel, only 4500 acres of which were affected by one of the challenged decisions.

2. Whether the district court properly entered summary judgment against the respondent for its failure to make a timely showing of its standing to sue.

### PARTIES TO THE PROCEEDING

The petitioners are Manuel Lujan, Jr., in his official capacity as Secretary of the Interior; Cy Jamison, in his official capacity as Director of the Bureau of Land Management; and the Department of the Interior. The respondent is the National Wildlife Federation. In addition, the following parties intervened in the proceedings before the district court: Mountain States Legal Foundation; Rep. John Seiberling, succeeded by Rep. Bruce Vento, who intervened for the purpose of supporting respondent on Count II of the Complaint; and The Trust for Public Land, The Department of Water and Power for the City of Los Angeles, The County of Inyo, California, and The California Energy Company, Inc., each of which intervened for the purpose of obtaining an exemption from the preliminary injunction. Finally, ASARCO, Inc. sought intervention in the district court and, as a party to the proceedings before the court of appeals, it appealed from the denial of intervention.

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**In the Supreme Court of the United States**

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MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,  
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NATIONAL WILDLIFE FEDERATION, ET AL.

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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The Acting Solicitor General, on behalf of the Secretary of the Interior, et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 878 F.2d 422. The opinion of the district court (Pet. App. 26a-37a) is reported at 699 F. Supp. 327. Prior opinions of the court of appeals (Pet. App. 38a-115a, 116a-118a) are reported, respectively, at 835 F.2d 305 and 844 F.2d 889, while prior opinions of the district court (Pet. App. 119a-136a, 137a-150a) are reported, respectively, at 676 F. Supp. 271 and 676 F. Supp. 280.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 151a) was entered on June 20, 1989. On September 10, 1989, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 18, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2 of the Constitution extends "[t]he judicial Power \* \* \* to all Cases [and] \* \* \* Controversies."

The Administrative Procedure Act, 5 U.S.C. 702, provides, in relevant part:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

## STATEMENT

1. a. The Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, constitutes the "organic act" of the Bureau of Land Management (BLM or the Bureau), a subdivision of the Department of the Interior. The Act requires the Secretary of the Interior to undertake systematic land use planning for "public lands," which consist of those federally owned lands administered by the BLM. See 43 U.S.C. 1701, 1702(e), 1712. In carrying out that function, the Secretary is directed to develop and employ "land use plans." 43 U.S.C. 1712(a). Although the Act does not define "land use plans," it does provide, in Section 202(c), nine criteria for the development of such plans. 43 U.S.C. 1712(c).

Prior to the enactment of FLPMA, the BLM administered federally owned land under a patchwork of statutes and executive orders. Those directives permitted, among other matters, "withdrawal" and "classification" of the lands. To "withdraw" lands means to withhold discrete areas from disposal under one or more of the general land laws, or to reserve or dedicate lands for a specific purpose. See 43 U.S.C. 1702(j); Public Land Law Review Commission, *One Third of the Nation's Land* 42 (1970). "Classifications" are an administrative tool to designate lands managed by BLM either for specific uses in some cases, or, more generally, for retention or disposal under the public land laws.<sup>1</sup>

In discharging its land use responsibilities prior to FLPMA, BLM developed and employed a form of land use plan known as a "Management Framework Plan" (MFP). The development and use of MFPs began in 1969 and continued until well after FLPMA was enacted in 1976. Many of the plans remain in operation today. FLPMA itself recognizes the existence of this type of land use plan; the Act also expressly authorizes changes in pre-existing classifications and withdrawals. As to classifications, Section 202(d) provides:

Any classification of public lands or any land use plan in effect on October 21, 1976, is subject to review in the land use planning process conducted

<sup>1</sup> Although these two management tools are functionally similar, their origins (and their treatment under FLPMA) are different. Prior to FLPMA, withdrawals were generally created by the direct exercise of presidential authority. Classifications are authorized by Congress under the Taylor Grazing Act, 43 U.S.C. 315f, and were required by the Classification and Multiple Use Act, Pub. L. No. 88-607, 78 Stat. 986 (which expired in 1970), to provide an administrative mechanism, short of presidential authority, for classifying lands.

under this section, and all public lands, regardless of classification, are subject to inclusion in any land use plan developed pursuant to this section. The Secretary may modify or terminate any such classification consistent with such land use plans.

43 U.S.C. 1712(d). As to withdrawals, Section 204(a) provides:

On or after the effective date of this Act the Secretary is authorized to make, modify, extend or revoke withdrawals but only in accordance with the provisions and limitations of this section.

43 U.S.C. 1714(a). Section 204(f) then sets forth various provisions dealing with the creation and termination of withdrawals, including a subsection requiring the Secretary to review certain existing withdrawals in the eleven contiguous western states that, among other matters, prevent mineral location or leasing. 43 U.S.C. 1714(f). That subsection requires the Secretary to report his findings to the President for transmission to Congress by 1991 and, if the President concurs, allows the Secretary to terminate those non-statutory withdrawals unless, within 90 days of transmission, the Congress has adopted a concurrent veto resolution.

b. Pursuant to FLPMA, BLM undertook to review thousands of classifications and withdrawals of federal lands that had been implemented during the preceding decades. In doing so, the Bureau typically relied upon MFPs, which included the following factual materials: "unit resource analyses" of all the natural resources within the planning unit; an ecological profile; an analysis of the social and economic factors affecting land management; and "planning area analyses" that provided an integrated account of the social, economic, resource, and environmental features of the area. After evaluation by an inter-

disciplinary team of specialists and resolution of any conflicts regarding resource allocation, the MFP would be created. At all stages, but particularly before the MFP became final, the public—at the federal, state, and local level—would be informed about the process and invited to review the plans and proposals. Typically following the preparation of a Land Report containing an Environmental Assessment or Categorical Exclusion required by the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, BLM would decide how, if at all, to alter the designation of the land.

In 1979, BLM issued revised land use regulations, calling for the development of a different type of land use plan, called a Resource Management Plan (RMP). 43 C.F.R. 1610.8(a) (1988). These regulations recognized the continued use of MFPs, and provided for the gradual phase-in of RMPs to replace the MFPs as necessary.

2. a. On July 15, 1985, respondent National Wildlife Federation (hereinafter "respondent") filed the present action, charging that BLM had undertaken a massive program to lift "protective" restrictions on federal lands, in violation of the provisions of FLPMA, the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* Rep. Seiberling (who has since retired from the House) intervened in support of respondent, and Mountain States Legal Foundation (MSLF) intervened in support of petitioners.

As subsequently amended, respondent's complaint alleged that the Federation and its members "are suffering and will continue to suffer injury in fact as a result of the challenged actions." Amended Complaint para. 6. In particular, the complaint continued, the Federation's members "use and enjoy the environmental resources that will be adversely affected by the challenged actions." *Ibid.*

The complaint did not, however, identify the "adversely affected" resources, other than by appending a list of 788 notices of "land status actions" published in the *Federal Register* since January 1, 1981. Even that list, the complaint asserted, was "not intended to be inclusive." *Id.* at para. 18.

With those allegations of standing as a predicate, respondent asserted three principal causes of action. First, respondent claimed that petitioners violated FLPMA by failing to prepare RMPs in connection with its classification terminations (covering about 160 million acres) (Count I). Second, the complaint alleged that petitioners violated Section 204(f) of FLPMA when they revoked certain withdrawals (affecting about 20 million acres) in eleven western states without first submitting a review recommendation to the President and the Congress (Count II). Third, respondent asserted that petitioners violated FLPMA by failing to provide an opportunity for public participation in the "land use status" decisions (Count VII).

b. On December 4, 1985, the district court denied petitioners' motion to dismiss for failure to join indispensable parties and granted respondent's request for a preliminary injunction (Pet. App. 119a-136a). On a motion for reconsideration, the court also rejected MSLF's contention that respondent had not adequately alleged injury in fact from petitioners' actions (*id.* at 137a-150a). The court issued a nationwide preliminary injunction, enjoining the government from "[t]aking any action inconsistent with any withdrawal, classification, or other designation governing the protection of lands in the public domain that was in effect on January 1, 1981" (*id.* at 185a), thereby freezing the status quo as of that date for at least 180 million acres — an area equal to about one-thirteenth of the land mass of all fifty states.

The injunction had sweeping implications. In addition to halting more than 260 agricultural entries, the injunction froze hundreds of land transactions, including a land exchange between the Bureau and the State of Arizona under which the federal government would have obtained 500,000 acres of state land scattered throughout wilderness study areas and desert bighorn sheep and riparian wildlife habitat areas, in exchange for 150,000 acres of federal land (Martyak Affidavit at 6-7; J.A. 203-204); revocation of a land withdrawal that otherwise would have permitted the construction of a power-generation dam in the Grand Canyon Recreation Area (Bible Affidavit and attached videotape); and pending or proposed sales of BLM lands near Las Vegas, Nevada, to generate money to permit the Forest Service to purchase environmentally sensitive land in the Lake Tahoe Basin.<sup>2</sup> See Collins Affidavit at 1.

In light of the extraordinary scope of the preliminary injunction, the district court, over the course of the next several months, received numerous requests for exemptions. The court found it necessary to modify the preliminary injunction at the outset, ruling, in an order of February 10, 1986, that the injunction did not directly enjoin the activities of third parties (although the practical effect of the revised injunction was to prohibit third party activities on affected lands in the many cases in which the transaction had not been completed). Pet. App. 145a. Thereafter, in response to federal legislation enacted to revise the court's injunction, the court approved additional amendments to its injunctive order. See, e.g., Order of November 25, 1986 (Pet. App. 169a); Order of April 8, 1988 (Pet. App. 160a-161a); Pub. L. No. 99-542, § 3,

<sup>2</sup> Congress had specifically authorized these transactions in the Burton-Santini Act. Pub. L. No. 96-586, 94 Stat. 3381.

100 Stat. 3038-3039; Pub. L. No. 99-590, § 104, 100 Stat. 3332; Pub. L. No. 99-632, §§ 4, 6-7, 100 Stat. 3520, 3521; Pub. L. No. 99-606, § 12(h), 100 Stat. 3467.<sup>3</sup> Indeed, in one instance, respondent itself sought an exemption from the injunction for a land exchange that all viewed as environmentally beneficial. The court denied that request, without explanation (Order of April 30, 1986, entered May 5, 1986 (Pet. App. 174a-175a)).<sup>4</sup>

c. In May 1986, more than five months after the district court issued its injunction, respondent submitted three affidavits of members to support its standing to challenge the hundreds of land use orders affecting the approximately 180,000,000 acres of public land. The affidavit of Peggy Key Peterson stated (Pet. App. 191a):

My recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of

<sup>3</sup> On the other hand, when the Trust for Public Land—another environmental organization—sought to intervene in order to petition the district court to exempt from the injunction a land exchange that would have added 371 acres to various wilderness and forest lands, the district court granted intervention but refused to permit the exemption. Order, March 6, 1986 (Pet. App. 176-177a).

<sup>4</sup> Similarly, in August 1986, the Department of Water and Power for the City of Los Angeles, the California Energy Company, Inc., and the County of Inyo, California sought to intervene in the action to seek exemptions from the preliminary injunction “for the limited purpose of obtaining a declaration that Cal Energy’s geothermal operations on Naval Weapons Center lands • • • in the Coso Known Geothermal Resource Area, Inyo, California, are not within the scope of [the injunction]” or for an exemption for these operations. Motions to Intervene, Docket Nos. 188-190 (August 15, 1986). The district court ultimately issued an order interpreting its injunction to exclude these operations, but denying a request to declare that a congressionally-approved exchange of the land on which these operations are conducted is not within the scope of the injunction. Orders, Jan. 6, 1987, and Dec. 31, 1986 (Pet. App. 165a-168a).

South Pass-Green Mountain, Wyoming have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department. In particular, the South Pass-Green Mountain area of Wyoming has been opened up to the staking of mining claims and oil and gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands.

The affidavit of Richard Loren Erman was virtually identical to the Peterson affidavit, except that it alleged that Mr. Erman uses land “in the vicinity of the Grand Canyon National Park, the Arizona Strip (Kanab Plateau), and the Kaibab National Forest” (Pet. App. 187a). That area, called the Arizona Strip, contains 5.5 million acres, one-eighth of the State of Arizona. Erman claimed injury from potential mining in that area allegedly made possible by Interior’s action.

Finally, in support of its claim of “informational standing,” respondent submitted a declaration of a vice-president of the organization, Lynn Greenwalt. The Greenwalt declaration alleged injury to the group’s ability to acquire and disseminate information about the public lands. Pet. App. 193a-194a.

3. a. The government and MSLF appealed, and a panel of the court of appeals affirmed by a divided vote (Pet. App. 38a-115a). In upholding the preliminary injunction, the court concluded that respondent had “alleged injury in fact sufficient to establish standing to pursue its two FLPMA claims [Counts I and VII] against the Department.” *Id.* at 56a. The court noted that respondent had alleged that its members regularly use the lands at issue (*id.* at 51a-52a), and it rejected the contention that those allegations were insufficiently specific. In any event, the court stated (*id.* at 53a-54a):

Even if this lack of specificity were somehow fatal to the complaint, it was cured by the affidavits of two Federation members filed with the district court after issuance of the preliminary injunction. \* \* \* These affidavits provide a concrete indication that the Federation's members use specific lands covered by the agency's Program and will be adversely affected by the agency's actions. Mountain States contends that even these affidavits are insufficient because the named members claim only to use resources in the "vicinity" of the land covered by the challenged withdrawal revocations. The Federation's allegations in this regard however comport with those in [*United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973)]; they therefore are sufficiently specific for purposes of a motion to dismiss.<sup>3</sup>

Judge Williams concurred in the judgment on the standing issue, but wrote separately "in the hopes of clarifying what a plaintiff must show to meet the injury-in-fact component of standing when it seeks a preliminary injunction" (Pet. App. 85a-86a). He stated that "NWF challenges the legality of two programs—classification terminations and withdrawal revocations—that together affect over 180 million acres of public lands" (*id.* at 86a). He reasoned that standing principles require that respondent (*ibid.*):

- (1) identify lands that are affected by each program;
- (2) demonstrate that third parties are likely to respond to the regulatory changes with development activities;
- and (3) identify activities of members in specific areas that would suffer an adverse impact from such third party conduct.

<sup>3</sup> The court also held that respondent had not failed to join indispensable third parties or exhaust its administrative remedies, and that the complaint was not barred by laches. Pet. App. 57a-65a.

Judge Williams concluded that while respondent had adequately identified the land at issue, "[a]s to the other elements, NWF's submissions were markedly defective" (*id.* at 89a). In particular, he explained, the allegations in the complaint were "too vague," as were the assertions contained in respondent's affidavits (*ibid.*). He nevertheless concluded that the record "provides modest support for the inference that some types of the disputed regulatory status changes have a material likelihood of leading to development activity potentially injurious to the activities of plaintiff's members on the lands named in the affidavits" (*id.* at 90a).<sup>6</sup>

b. The government and MSLF thereafter filed petitions for rehearing, and the panel denied the petitions in a per curiam memorandum. Pet. App. 116a-118a. In doing so, however, the court recognized that "some of the criticisms of the breadth and the scope of the preliminary injunction offered in the vigorous dissent are not without force" (*id.* at 117a-118a). It also acknowledged that "the disposition of these millions of acres should not continue to rest any longer than necessary on the foundation of a preliminary injunction which was entered on consideration of the brief affidavits and cursory materials presented to the court below" (*id.* at 118a). The court therefore "issue[d] its mandate forthwith with directions to the parties and the district court to proceed with this litigation with dispatch" (*ibid.*).

4. a. In July 1986, following the remand, respondent filed a motion for summary judgment, and the govern-

<sup>6</sup> Judge Williams dissented from the court's affirmance of the preliminary injunction, concluding that respondent was not likely to prevail on the merits, that it had failed to show a sufficient threat of irreparable harm, and that the potential threat of harm to other parties and to the public interest weighed against the issuance of an injunction. Pet. App. 99a-115a.

ment thereafter served 16 notices of deposition to discover the basis of respondent's allegations of standing. Respondent parried that request by successfully obtaining an order from the district court precluding the government from conducting discovery, asserting that any such discovery "would be unreasonably cumulative, duplicative, burdensome and expensive" (*Motion to Quash and for a Protective Order* at 7; Pet. App. 170a).

In support of a cross-motion for summary judgment, the government submitted extensive affidavits addressed to the question of standing. For its part, respondent continued to base its standing on the three affidavits identified by the court of appeals, filing no additional affidavits within the time allotted under Fed. R. Civ. P. 56. At the close of the July 1988 hearing, however, the district court requested supplemental briefing on the question of NWF's standing. In response to that request, respondent submitted four additional affidavits. The district court refused to consider those affidavits, finding that they were "untimely and in violation of our Order" (Pet. App. 28a-29a n.3).

b. On November 4, 1988, the district court vacated the outstanding preliminary injunction, granted the government's motion for summary judgment, and dismissed the action for want of standing (Pet. App. 26a-37a). The court explained that to establish its standing, respondent was required to "plead and prove that it or its members have suffered some actual or threatened injury as the result of defendants' allegedly unlawful conduct" (*id.* at 31a). The court found that respondent had failed to meet that burden.<sup>7</sup>

<sup>7</sup> The court noted that the previous ruling concerning standing "arose in the posture of defendant's motion to dismiss, which affected the degree of factual specificity required to be shown in order to establish the likelihood of personal injury to plaintiff's members" (Pet. App. 29a). On a motion for summary judgment, it explained, a court is entitled to reconsider a preliminary determination of standing (*id.* at 30a).

The court first examined respondent's claim that the government had not permitted sufficient public participation in its review process. On that claim, the court noted, respondent based its standing on the Greenwalt affidavit, which simply stated that the Federation's ability to meet its obligation to its members "has been significantly impaired by the failure of the Bureau of Land Management and the Department of the Interior to provide adequate information and public participation with respect to the Land Withdrawal Review Program" (Pet. App. 32a). The court found that statement "conclusory and completely devoid of specific facts" (*ibid.*), concluding that it provided "no basis to support [respondent's] claim of standing" (*ibid.*).<sup>8</sup>

The court turned next to respondent's claim of standing based on alleged environmental harm to its members resulting from the termination of classifications and the revocation of withdrawals. It first observed that any harm to NWF's members would result from the response of third parties (such as mining companies) to the government's actions and that "the judgment regarding the likelihood of injury turns on whether the plaintiff's future conduct will occur in the same location as the third party's response to the challenged governmental action" (Pet. App. 34a). The court observed that respondent "rest[ed] its entire claim of standing to sue for environmental injury on the affidavits of two persons, *i.e.*, Peggy Peterson and Richard Erman" (*ibid.*), which "use the same boiler plate language and format" (*id.* at 34a n.10). The court ob-

<sup>8</sup> The court also noted that "[a]lthough not required to do so, because defendants did not have the burden to disprove plaintiff's conclusory contention, defendants have advised plaintiff of the environmental documentation and the methodology employed and have made its [*sic*] extensive files containing such information available for plaintiff's inspection" (Pet. App. 32a n.8).

served that Peterson's affidavit simply "claims that she uses federal lands *in the vicinity* of the South Pass-Green Mountain area of Wyoming for recreational purposes and for aesthetic enjoyment" and that her enjoyment has been "adversely affected as the result of the decision of the BLM to open it to the staking of mining claims and oil and gas leasing" (*id.* at 34a-35a). Based on the government's affidavits, however, the court noted that 1,993,500 acres of the 2-million acre South Pass-Green Mountain area (about 99.675%) had always been open to mining and mineral leasing and that petitioners' termination of the relevant classification opened up only an additional 4500 acres (.225%) of that area. See *id.* at 35a. The court observed that Peterson's affidavit, which simply asserted that "she uses lands 'in the vicinity' " of the 2,000,000 acre area, failed to establish that her use "extend[ed] to the particular 4500 acres covered by the decision to terminate classification to the remainder of the two million acres affected by the termination" (*ibid.*).

The court concluded that the Erman affidavit was "similarly flawed." Pet. App. 35a. Erman, the court noted, asserted that he used federal lands "in the vicinity" of the Grand Canyon National Park and the Arizona Strip and that his enjoyment would be adversely affected by the BLM's actions, "with particular reference to the opening and staking of mining claims" in that 5.5 million acre area, "an area one-eighth the size of the State of Arizona" (*id.* at 35a-36a). The government's affidavits showed, however, that "virtually the entire Strip is and for many years has been open to uranium and other metalliferous mining" (*id.* at 36a), and that the "revocation of withdrawal concerned only non-metalliferous mining in the western one-third of the Arizona Strip, an area possessing no potential for non-metalliferous mining" (*ibid.*). The court concluded (*id.* at 36a-37a):

Both the Peterson and Erman Affidavits are vague, conclusory and lack factual specificity. They do not and cannot show "injury in fact" with respect to the two specific areas in Wyoming and Arizona in the vicinity of which these affiants claim to be located. More important, standing alone, these two affidavits do not provide any basis for standing to challenge, as violative of the Federal Land Policy Management Act, the legality of each of the 1250 or so individual classification terminations and withdrawal revocations. It should be noted that plaintiff's claims of injury reach hundreds of decisions affecting 180 million acres spread over seventeen states. Since plaintiff lacks standing in the constitutional sense or as an "aggrieved party" under Section 702 of the APA, we lack subject matter jurisdiction and dismiss for lack of standing.<sup>9</sup>

5. The court of appeals reversed (Pet. App. 1a-25a). The court first ruled that the Peterson affidavit, by itself, sufficiently established "injury-in-fact" to withstand summary judgment under Section 702 of the APA and the Constitution (*id.* at 15a-16a). The court acknowledged that the affidavit did not state that Peterson had used the 4500 acres in South Pass-Green Mountain that were actually opened to mining and mineral leasing (*id.* at 16a-17a). It reasoned, however, that (*id.* at 17a (citation omitted)):

The language of Peterson's affidavit can be read to *presume* that the 4500 newly opened acres included the areas that Peterson uses; otherwise *her* use and enjoy-

<sup>9</sup> In light of its standing decision, the district court found it unnecessary to reach "the merits of plaintiff's claim for injunctive relief" (Pet. App. 37a). It noted, however, that Judge Williams' dissenting opinion "mirrored many of the[ ] problems in its discussion of our grant of preliminary injunction" (*ibid.*).

ment would not be "adversely affected." \* \* \* If Peterson was not referring to lands in this 4500-acre affected area, her allegation of impairment to her use and enjoyment would be meaningless, or perjurious. The District Court in no way questions the *veracity* or *clarity* of the affidavit, only its *specificity*. \* \* \* But the trial court overlooks the fact that unless Peterson's language is read to refer to the lands affected by the Program, the affidavit is, at best, a meaningless document.

The court added that, "[a]t a minimum," the affidavit is ambiguous, and thus, on summary judgment, the district court should have resolved that ambiguity in favor of the non-moving party, in this case the respondent. *Ibid.*<sup>10</sup>

The court of appeals also held that the law of the case doctrine required a ruling on the standing question in respondent's favor. Pet. App. 18a-20a. The court noted that in affirming the preliminary injunction issued by the district court, a previous panel had rejected a challenge to respondent's standing. *Id.* at 18a-19a. The court reasoned that since "the burden for establishing irreparable harm to support a request for a *preliminary injunction* is, if anything, *at least as great* as the burden of resisting a *summary judgment motion*" (*id.* at 20a), the prior decision "upholding petitioners' standing is therefore the law of the case, which disposes of this appeal" (*ibid.*).

Finally, the court found it "unfair and an abuse of discretion for the trial court to refuse to consider the affidavits submitted by NWF when the court asked for supplemental memoranda on the standing issue" (Pet. App. 21a). The court surmised that "[n]o party to this litigation

<sup>10</sup> The court noted that since it found the Peterson affidavit sufficient to survive summary judgment, it did not need to address the sufficiency of the Greenwalt and Erman affidavits. Pet. App. 18a n.13.

seriously disputes that NWF's supplemental affidavits, if considered, easily satisfy the level of specificity needed for standing under any of the Supreme Court's articulated tests" (*ibid.*).<sup>11</sup>

Having rejected petitioners' summary judgment challenge to respondent's standing, the court directed the trial court, on remand, to "address NWF's claims on the merits and fashion whatever relief it deems appropriate" (Pet. App. 24a). It "decline[d], however, to reinstate the preliminary injunction because the case should now proceed with dispatch" (*id.* at 25a).

#### REASONS FOR GRANTING THE PETITION

The decision of the court of appeals expands the standing doctrine beyond meaningful limitation. Departing from the already generous standards articulated in *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669 (1973), and *Sierra Club v. Morton*, 405 U.S. 727 (1972), the court below accepted a single, vague allegation—one member's use of land "in the vicinity of" a two million acre area—as a sufficient basis for challenging hundreds of separate land use and disposition decisions affecting some 180,000,000 acres of public lands. To do so, the court was constrained to "presume" that the affiant intended to assert an interest in a particular 4500 acre area—although the affiant had never adverted to that parcel, let alone asserted a personal interest in it.

The court's misapplication of standing principles, left undisturbed, will permit respondent, and similar plaintiffs

<sup>11</sup> In a footnote, the court held that, having established its standing to challenge one particular land action, respondent therefore had standing to challenge all of the hundreds of land actions involved in the case. Pet. App. 16a n.12.

in the future, to petition federal courts for far-reaching relief from injuries that they have not shown any likelihood of suffering. The decision thus threatens to draw the courts into disputes that lack "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult \* \* \* questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). And once drawn so comprehensively into the fray, the courts will inevitably assume (as exemplified by the nationwide preliminary injunction here) managerial responsibilities for wide-ranging federal activities—activities whose administration properly belongs in the Executive Branch.

1. a. Article III of the Constitution limits the judicial power to "Cases, [and] Controversies[.]" To establish standing under Article III, a plaintiff must allege a personal injury that is fairly traceable to the defendant's unlawful conduct and that is likely to be redressed by the relief sought. *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). The injury cannot be an "abstract" or "hypothetical" one (*O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983)); it must be "'distinct and palpable'" (*Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)). Only by identifying a concrete injury-in-fact can a plaintiff "'allege[ ] such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf" (*Warth v. Seldin*, 422 U.S. 490, 498-499 (1975), quoting *Baker v. Carr*, 369 U.S. at 204).

The Administrative Procedure Act, 5 U.S.C. 702, under which this suit was filed, complements Article III standing by limiting challenges to parties who are "aggrieved or ad-

versely affected" by a governmental action. Under Section 702, the Court has required plaintiffs to show that they are personally injured and that their injury is caused by the challenged action. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. at 472, 487-488 n.24; *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38-39 (1976); *Sierra Club v. Morton*, 405 U.S. at 732-733 & n.3.<sup>12</sup>

To be sure, the Court's decisions in *Sierra Club v. Morton*, 405 U.S. 727 (1972), and *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), on which the court of appeals relied (Pet. App. 14a-15a, 17a), took a somewhat expansive view of standing. But in both cases the Court nonetheless insisted upon a clear showing of direct and personal injury. Thus, in *Sierra Club*, the Court held that the mere assertion that the Club had "a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country" was not enough to confer standing. 405 U.S. at 730. Because the Sierra Club had failed to allege any individualized interest in the specific lands in dispute, the Court rejected its standing claim. *Id.* at 734-735. Similarly, in the *SCRAP* case, in which the Court upheld the plaintiffs' standing, the Court emphasized that the plaintiffs had specifically alleged that their members "used the forests, streams, mountains, and other resources in the Washington metropolitan area" (412

<sup>12</sup> Section 702 also requires plaintiffs to show that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 395-396 (1987), quoting *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970).

U.S. at 685)—resources which, according to the allegations in the complaint, would be “directly harm[ed]” by the challenged government action (*id.* at 687).

b. Respondent made no such showing in the present case. The single affidavit on which the court of appeals relied—the Peterson affidavit—stated only that a single member uses land “in the vicinity of” a two million acre area. That area contains, scattered within it, no more than 4500 acres of land (.225% of the total) affected by the challenged land status actions in this case. But nothing in the Peterson affidavit suggests that the affiant has any connection with the affected lands—just that she uses and enjoys land “in the vicinity of” the millions of acres that surround them. And with that weak toehold, respondent secured standing to challenge not only the two million acre parcel identified in the affidavit, but also the remaining 178,000,000 acres of public lands whose status is in dispute.

In granting summary judgment on the record before it, the district court correctly concluded that respondent’s standing allegations were “vague, conclusory, and lack factual specificity.” Pet. App. 36a.<sup>13</sup> The court of appeals held otherwise only by “presum[ing]” language that the affidavit simply does not contain. In the court’s view, “[t]he language of Peterson’s affidavit can be read to *presume* that the 4500 newly opened acres included the areas that Peterson uses; otherwise, *her* use and enjoyment would not be ‘adversely affected.’ ” *Id.* at 17a. The court’s reasoning is exactly backwards; it “presumed” the requisite

<sup>13</sup> See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (“the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case”).

standing allegations because, had it not done so, respondent’s standing claim “would be meaningless, or perjurious” (*ibid.*). The court’s presumption—that a mere claim of standing necessarily implies a factual basis to support it—wholly nullifies the standing requirement. It is precisely because Peterson did *not* allege any use of, or other interest in, the affected land that respondent lacks standing to challenge the government’s actions. The court below had no warrant for imputing to the affiant allegations that she did not—and perhaps could not—make on her own. Furthermore, the court grossly compounded its error by ignoring the total lack of nexus between Peterson’s faulty affidavit and the vast additional lands throughout the Nation comprehended in the suit.<sup>14</sup>

2. Standing requirements take on added significance when an exercise of judicial power would “affect[ ] relationships between coequal arms of the National Government,” because “‘repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either’ ” (*Valley Forge*, 454 U.S. at 473-474, quoting *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)). Indeed, the standing requirements themselves arise out of a “single basic idea—the idea of separation of powers” (*Allen v. Wright*, 468 U.S. at 752)—in that they demarcate funda-

<sup>14</sup> The court of appeals alternatively surmised that the Peterson affidavit was, at worst, ambiguous, thereby preventing entry of summary judgment. Pet. App. 17a. That conclusion was also wrong. Ambiguity, without more, is not grounds for resisting summary judgment. To the contrary, under Fed. R. Civ. P. 56(e), it is up to the plaintiff to “set forth specific facts showing that there is a genuine issue for trial.” See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Respondent had ample opportunity prior to the hearing to meet that burden, but failed to do so.

mental limits on the role of the federal courts in our tripartite system of government. Departures from the rules of standing may rupture those limits. "Relaxation of standing requirements is directly related to the expansion of judicial power" (*Richardson*, 418 U.S. at 188 (Powell, J., concurring)), and such relaxation may bring into court "generalized grievances more appropriately addressed in the representative branches" (*Allen*, 468 U.S. at 751).

The present case conspicuously illustrates the separation-of-powers concerns implicated by a basic misapplication of standing principles. Indeed, the very scope of the litigation reflects its lack of Article III moorings. Early on, the district court entered, and the court of appeals sustained, a preliminary injunction freezing—for nearly three years—the status of almost 180 million acres of public land. That acreage amounts to approximately 281,000 square miles, a size exceeding that of all the states on the eastern seaboard from North Carolina to Maine. In addition to halting more than 260 agricultural entries, the injunction froze hundreds of land sales and exchanges, including at least one transfer that even respondent acknowledged to be environmentally beneficial. See p. 8, *supra*. And in administering that injunction, the district court was required to assume the role of a nationwide land use czar—fielding an array of conflicting claims for exemptions, granting some, while rejecting others. See pp. 7-8 & notes 3, 4, *supra*.

But even without the injunction in place (for now), the litigation is overwhelming. If remanded, the case will require the trial court to review administrative records relating to the hundreds of individual land decisions challenged by respondent, and to determine in each instance whether the land use plan on which petitioners relied satisfied the requirements of FLPMA. Managing a litigation of such dimension aggregates expansive powers in the court,

and withdraws them, correspondingly, from the executive officials charged by law with the day-to-day responsibility for administering the public lands. The result, in this case, is a lawsuit seeking judicial supervision of the Secretary's entire administration, throughout the Nation, of his duties under FLPMA.

Standing doctrines are designed to avoid such clashes between judicial and executive authority. Under our constitutional system, the judicial power may be invoked to resolve controversies between persons adversely affected by a particular government action and the officials who took that action, not to supervise public officials' general conduct of their duties. In this case, the failure of the district court (at first) and the court of appeals (throughout) to adhere to this basic precept of judicial power under Article III has led to "adjudication in a vacuum" (Pet. App. 105a)—a vacuum in which the court imposed massive injunctive relief, controlling a huge amount of public land and unrepresented third parties, without any showing of injury-in-fact to respondent or any of its members. The court of appeals has now ordered this massive case to proceed to trial on the same flawed premise. The court's fundamental misapplication of standing principles warrants this Court's review.<sup>15</sup>

<sup>15</sup> The court of appeals adduced two alternative bases for its resolution of the standing question, but neither has any force. First, the court held that the prior panel decision on the appeal from the entry of the preliminary injunction constituted the "law of the case" and therefore precluded reconsideration of respondent's standing at the summary judgment stage. But a court is always free (indeed, where necessary, required) to examine its own jurisdiction, including a plaintiff's standing to commence an action. Moreover, allegations of injury that may be sufficient to survive a motion to dismiss or to warrant a preliminary injunction may not be sufficient to withstand a motion for summary judgment—which will typically be made on a fuller

## CONCLUSION

The petition for a writ of certiorari should be granted.  
Respectfully submitted.

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OCTOBER 1989

record, developed after more extensive discovery. See *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *United States v. SCRAP*, 412 U.S. at 689. Indeed, notwithstanding the second panel's determination (Pet. App. 19a-20a), the first panel decision in this case recognized that very point, stating that the allegations in the affidavit were "sufficiently specific for purposes of a motion to dismiss" (*id.* at 54a (emphasis added)). In any event, the earlier panel decision, which was predicated on the same cursory affidavits that were before the court of appeals the second time around, is mistaken for the same reasons we have noted above. What is more, this Court's review of the court of appeals' standing decision is not affected by whether *that* court was bound by its own law of the case.

The court also defended its standing decision on the ground that the district court should have considered the supplementary affidavits submitted by respondent, in violation of Fed. R. Civ. P. 56(c), after the hearing on summary judgment. In view of the tardiness of that submission, and respondent's previous resolute insistence that the first three affidavits were sufficient, it was not an abuse of the trial court's discretion to refuse to accept the new material. The court of appeals' ruling on this point, accordingly, should also be reversed. Moreover, at a minimum, the government should have been entitled to contest the sufficiency and bona fides of the new submissions.

\* The Solicitor General is disqualified in this case.

89-640

No.

Supreme Court, U.S.  
FILED  
OCT 18 1989

PANIEL, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1989

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,  
ET AL., PETITIONERS

v.

NATIONAL WILDLIFE FEDERATION, ET AL.

**APPENDIX TO  
PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**APPENDIX A**

**UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT**

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**No. 88-5397**

**NATIONAL WILDLIFE FEDERATION, APPELLANT**

**v.**

**ROBERT F. BURFORD, ET AL.**

---

**No. 88-5291**

**NATIONAL WILDLIFE FEDERATION**

**v.**

**ROBERT F. BURFORD, ET AL.**

---

**Appeal of ASARCO INCORPORATED,  
Applicant for Intervention**

---

**Decided June 20, 1989**

---

**Before: EDWARDS and RUTH BADER GINSBURG, Circuit  
Judges, and KAUFMAN, Senior Judge.**

---

**\* Of the United States District Court for the District of Maryland,  
sitting by designation pursuant to 28 U.S.C. § 294(d).**

**(1a)**

Opinion for the Court filed by Circuit Judge HARRY T. EDWARDS

HARRY T. EDWARDS, Circuit Judge:

In July 1985, appellant National Wildlife Federation ("NWF" or "Federation"), a nonprofit natural resources conservation and education association with over 4.5 million members, brought suit to challenge a Department of Interior ("Interior" or "Department") decision to reclassify the status of approximately 180 million acres of public land. The present appeals involve two decisions arising out of NWF's suit. First, on November 4, 1988—after extended preliminary proceedings, including the issuance of a preliminary injunction enjoining Interior's challenged activity, which was upheld by this court in *National Wildlife Federation v. Burford*, ("Burford I"), 835 F.2d 305 (D.C.Cir.1987), and various actions by the trial court amending the original injunction—the District Court granted Interior's motion for summary judgment on the ground that NWF lacked standing. NWF now appeals from that decision. Second, ASARCO, Inc. ("ASARCO"), a producer of nonferrous metals, appeals the District Court's denial of its motion to intervene. The District so ruled because it found ASARCO's motion to be untimely filed.<sup>1</sup>

On the first appeal, No. 88-5397, we adhere to the holding of the court in *Burford I* that NWF "has alleged injury in fact sufficient to establish standing to pursue its . . . claims against the Department," 835 F.2d at 314, and we conclude that the record before us is more than ade-

<sup>1</sup> These cases were argued separately before this court. NWF's appeal was docketed as case No. 88-5397, and ASARCO's as No. 88-5291. We have consolidated the two cases for decision because of the unity of the substantive issues underlying these procedural appeals.

quate to allow NWF to survive a motion for summary judgment on standing. Therefore, we reverse the judgment of the District of Court and remand for a determination on the merits.<sup>2</sup>

On the second appeal, No. 88-5291, we reverse the District Court's denial of ASARCO's motion to intervene with respect to one of ASARCO's claims, because we find that the motion was timely filed. We remand this portion of the case to the District Court to allow it to consider whether ASARCO's intervention is presently warranted.

## I. BACKGROUND

### A. Standing of the National Wildlife Federation

NWF filed suit under the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701 *et seq.* (1982); the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* (1982); and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.* (1982), challenging Interior's ongoing "Land Withdrawal Review Program" ("Program"). The Program primarily involves the termination of land "withdrawals" and "classifications," the two main vehicles through which Interior establishes and implements land use planning for millions of acres of federal public lands. "Classifications" allow Interior to categorize lands for specific usage, and frequently designate public lands for retention, thereby segregating them from the scope of various land disposal laws. "Withdrawals" directly remove designated public lands from disposal under the general land laws. The Program is implemented by the Bureau of Land Management ("BLM"), a subagency of Interior.

<sup>2</sup> We find it unnecessary to reinstate the preliminary injunction because the case should now proceed directly to the merits.

Pursuant to the Program, the Department, relying on its authority under the FLPMA,<sup>3</sup> lifted protective restrictions from nearly 180 million acres of federal land located in seventeen states. According to the Assistant Director of Land Resources for the BLM, over thirteen million acres of public lands that previously were closed to some or all types of mining are now open to be mined by private parties as a result of these classification and withdrawal terminations, see Affidavits of BLM Assistant Director Frank Edwards, Joint Appendix ("J.A.") 75, 102-03, and another eight million acres are now open for mineral leasing, *Burford I*, 835 F.2d at 324-25. Hundreds of leases and sales have already been effectuated or are pending for mining, mineral leasing, agricultural, commercial, and other proposed developmental uses. See *id.*

NWF filed suit challenging the Program on July 15, 1985, simultaneously moving for preliminary injunctive relief. On December 4, 1985, the District Court granted NWF's motion for a preliminary injunction, enjoining Interior from issuing any new "withdrawal revocations" or "classification terminations" and from engaging in any activities inconsistent with extant withdrawals and terminations. *National Wildlife Federation v. Burford*, 676 F.Supp. 271 (D.D.C.1985).<sup>4</sup>

<sup>3</sup> Until enactment of the FLPMA, terminations of classifications and withdrawals could be effected only by the President. However, in 1976, Congress enacted FLPMA § 202(d), 43 U.S.C. § 1712(d) (1982), which authorized the BLM to modify or terminate its previous classifications and withdrawals. The Program was thus enacted pursuant to the FLPMA and is subject to that statute's other substantive management criteria. See, e.g., *id.* §§ 1701, 1712, 1714.

<sup>4</sup> On February 10, 1986, pursuant to the defendants' motion to clarify, the District Court modified the injunction to make clear that it reached only the federal defendants and not absent third parties, and that it was not intended "to overturn or in any way to upset fee in-

On December 11, 1987, a panel of this court affirmed the District Court's grant of preliminary relief. See *Burford I*, *supra*. This court first addressed preliminary matters such as standing, the effect on absent third parties, and exhaustion, see 835 F.2d at 310-18, and concluded "that the Federation has alleged facts that demonstrate that the actions of the Department threaten to harm the cognizable interests of the Federation's members. Consequently, we find that the Federation has alleged injury in fact sufficient to establish standing to pursue its two FLPMA claims against the Department." *Id.* at 314. Passing to the merits, the court in *Burford I* held that the Federation had satisfied the burden of proof necessary to sustain a preliminary injunction. Conceding that this was a "close" case, *id.* at 319, the court nevertheless held that the District Court had not abused its discretion in finding that NWF had shown a likelihood of success on the merits, see *id.* at 327.<sup>5</sup>

Following this court's remand in *Burford I*, and during subsequent pre-trial proceedings before the District Court, NWF complained of the same specific injury from the Program's reclassifications that it had cited in its motion for the preliminary injunction. First, NWF claimed that its many members who "use and enjoy the environmental resources that will be adversely affected by the challenged

terests." *National Wildlife Federation v. Burford*, 676 F.Supp. 280, 284 (D.D.C.1986). The original injunction was subsequently amended three more times prior to this appeal to further limit the reach of the injunction.

<sup>5</sup> Subsequently, in the course of denying another motion, a panel of this court exhorted the District Court to proceed with the litigation "with dispatch" because millions of acres of land were "on hold" due to a preliminary injunction issued only on the basis of brief affidavits and other cursory materials, see *National Wildlife Federation v. Burford*, 844 F.2d 889, 890 (D.C.Cir.1988) (per curiam).

actions" would be deprived of such use by the development of these lands. Brief for Appellant NWF at 10. Second, NWF complained that the organization and its members had been injured by being denied "information on the potential impacts of defendants' actions" as well as "the opportunity to participate in defendants' decision-making." *Id.* In support of these complaints, NWF resubmitted to the trial court the affidavits of two of its members, Peggy K. Peterson, *see* J.A. 209, and Richard L. Erman, *see* J.A. 205, and the sworn declaration of its Vice-President for Resources Conservation, Lynn A. Greenwalt, *see* J.A. 212. Two of these same affidavits had been ruled sufficient to establish standing for the purposes of a preliminary injunction by both the District Court itself and by this court in *Burford I*.

Both sides moved for summary judgment; the matter was extensively briefed and oral argument was heard on the motions on July 22, 1988. After oral argument, the District Court directed both sides to submit additional memoranda by August 22, 1988, on the issue of NWF's standing to bring suit. Both parties complied with this order, but the trial court then declined to consider certain of the additional material submitted by the Federation. The court stated that it found these submissions, which included "declarations from four of its members," to be "evidentiary material," submitted "in addition to [NWF's] memorandum filed August 22, 1988." Because it found these submissions to be "untimely and in violation of our Order," it "decline[d] to consider them." *National Wildlife Federation v. Burford*, 699 F.Supp. 327 (1988), *reprinted in* J.A. 367, 370 n. 3 [hereinafter "Memorandum Opinion"].

In the same Memorandum Opinion, issued on November 4, 1988, the District Court also dismissed the case for lack of standing and lifted the preliminary injunc-

tion. The court acknowledged that NWF had established standing in the prior proceedings before the court of appeals because "the issue of standing arose in the posture of defendant's motion to dismiss." Memorandum Opinion, J.A. 370. On a motion to dismiss, the trial court reasoned, an appellate court had to assume the complaint's allegations to be true and had to construe them in a light most favorable to the organization. *See id.* (citing *Burford I*, 835 F.2d at 312; *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975)). The District Court opined that Supreme Court and subsequent D.C. Circuit precedent mandated that more specific injury-in-fact must be shown to sustain standing on a motion for summary judgment than to sustain standing on a motion to dismiss. *See Memorandum Opinion*, J.A. 370-71 (citing *United States v. Students Challenging Regulatory Agency Procedures* ("SCRAP"), 412 U.S. 669, 689 & n. 15, 93 S.Ct. 2405, 2417 & n. 15, 37 L.Ed.2d 254 (1973)); *Wilderness Society v. Griles*, 824 F.2d 4, 16-17 (D.C.Cir.1987). The trial court, however, failed to give due weight to the fact that the panel in *Burford I* held that NWF had established standing for purposes of a preliminary injunction, and not merely to survive a motion to dismiss.

Reconsidering its initial finding of standing in light of what it saw as this more demanding *SCRAP/Griles* standard, the trial court concluded that the affidavits submitted by NWF were insufficient evidence of injury-in-fact to sustain standing. The court rejected the affidavit of NWF Vice-President Greenwalt as "conclusory and completely devoid of specific facts." Memorandum Opinion, J.A. 374. Turning to the Peterson and Erman affidavits, the court noted that these presented the issue of so-called "third-party" injury—that is, injury to the plaintiff that is caused by the future conduct of a third party (in this case,

a mining company), in response to defendant's action, rather than by the direct action of the defendant. The court therefore defined the standing issue as "whether the plaintiff has put forward enough facts to show that his intended behavior will be injured as a direct or indirect result of the challenged governmental action." *Id.*, J.A. 375 (quoting *Griles*, 824 F.2d at 12). The trial court concluded that the Peterson and Erman affidavits were "vague, conclusory and lack[ed] [the] factual specificity. . . . [to] show 'injury in fact.'" *Id.*, J.A. 378. Specifically, the court found that, because Peterson claimed only that she uses lands "in the vicinity" of the South Pass-Green Mountain area of Wyoming for recreation, the affidavit was not specific enough to show that her use and enjoyment extended to the *particular* 4500 acres that would be affected by the challenged Department termination within the described two million acre area. The court found the Erman affidavit to be "similarly flawed" with respect to the Arizona lands it addressed. *See id.*, J.A. 377. This appeal followed.

#### B. ASARCO's Motion to Intervene

Under one classification that the Program terminated, 31,000 acres of federal land in central Oregon were withdrawn from private appropriation, including the location of mining claims. Pursuant to this classification termination, the BLM permitted ASARCO, whose business includes the exploration and development of mineral interests through mining claims on federal lands throughout the Western United States, to stake mining claims on some of these lands from November 1987 through January 1988. These claims are known as the "Spanish Gulch" claims. However, because of the order of the District Court enjoining the post-1981 terminations, the BLM

subsequently notified ASARCO by letter dated March 21, 1988, that its Spanish Gulch claims were null and void. The letter explained that as of February 10, 1986, and continuing until the injunction was lifted or modified, the BLM could not open the Spanish Gulch lands to private mining claims. *See* ASARCO Appendix ("A.A.") 30-31.

On June 6, 1988, ASARCO moved to intervene as a defendant in the NWF action.<sup>6</sup> ASARCO maintained that the scope of NWF's complaint and the application of the preliminary injunction did not extend to some interests in federal land, including ASARCO's Spanish Gulch claims.<sup>7</sup> Although ASARCO's motion to intervene was filed three years after the filing of NWF's original suit, and two-and-a-half years after the issuance of the District Court's preliminary injunction, it was filed less than three months after ASARCO was notified by Interior that its Spanish Gulch claims were directly affected by this litigation.

On July 22, 1988, the same day the District Court heard oral argument on the cross-motions for summary judgment in the ongoing NWF suit against the Government, the trial court also denied ASARCO's motion to intervene "into this longstanding litigation," stating that the motion was untimely under Rule 24 of the Federal Rules of Civil Procedure.<sup>8</sup> *See National Wildlife Federation v. Burford*,

<sup>6</sup> ASARCO also appealed the BLM's determination to the Interior Board of Land Appeals.

<sup>7</sup> ASARCO based this argument on the fact that some land classifications, including the Spanish Gulch claims, had already terminated by operation of law well before 1981, under the now-expired Classification and Multiple Use Act of 1964, so that the preliminary injunction could not encompass these terminations.

<sup>8</sup> ASARCO sought a stay of the District Court's order pending its appeal. By order dated September 6, 1988, the District Court denied the stay, finding that ASARCO's then-asserted interests were already adequately represented by existing parties to the litigation, that the

No. 85-2238 (D.D.C. July 22, 1988), *reprinted in* A.A. 39. As noted above, the District Court subsequently dismissed the Federation's case for lack of standing and simultaneously dissolved the preliminary injunction from which ASARCO claimed injury. ASARCO appealed, subject to this court's disposition of NWF's appeal in the primary case.

## II. ANALYSIS

### A. Standing of the National Wildlife Federation

It is well settled that an organization may have standing to bring suit on behalf of its members. *See International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v. Brock* ("UAW v. Brock"), 477 U.S. 274, 281-90, 106 S.Ct. 2523, 2528-29, 91 L.Ed.2d 228 (1986); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977). In *Hunt*, the Supreme Court determined that an organization seeking to pursue members' claims in a representational capacity may do so if

- (a) [one or more of the organization's] members would otherwise have standing to sue in their own right; (b) the interests [the organization] seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

432 U.S. at 343, 97 S.Ct. at 2441. *See also Burford I*, 835 F.2d at 311. At issue in the instant case is only the first of

motion to intervene was untimely, and that further postponement of the case "would be harmful to the parties and the public." *National Wildlife Federation v. Burford*, No. 85-2238, slip op. at 2 (D.D.C. Sept. 6, 1988).

the *Hunt* factors; no one disputes that the last two requirements have been met.<sup>9</sup> Thus, the crux of the standing issue in this case is whether Federation members would have standing to sue in their own right.

Article III of the Constitution limits the rights of individuals to seek judicial redress by extending the "judicial power" of the United States only to the resolution of "cases" and "controversies." U.S. CONST. art. III, § 2. In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982), the Supreme Court described the scope of these limitations as follows:

[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern*

<sup>9</sup> To wit, first, NWF seeks to protect its members' interests in preserving the environmental resources that will be adversely affected by the Interior action. These interests are germane to NWF's purposes, which include natural resource preservation and conservation. Second, there is no reason to require individual Federation members to participate in this case. Courts have generally required individual participation only when there are conflicts of interest within an organization, *see, e.g., Harris v. McRae*, 448 U.S. 297, 320-21, 100 S.Ct. 2671, 2689-90, 65 L.Ed.2d 784 (1980), or when individual participation in a suit is needed in order to make damage determinations, *see, e.g., Warth*, 422 U.S. at 515-16, 95 S.Ct. at 2213-14.

*Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1925, 48 L.Ed.2d 450 (1976).

Of these three constitutional standing components—injury-in-fact, causation, and redressability—the District Court in the case before us rested its denial of standing only on the first. It found that NWF had not demonstrated the requisite injury-in-fact, because NWF's affidavits did not evidence a particular showing of injury. We disagree and reverse this finding.<sup>10</sup>

<sup>10</sup> Defendant-intervenor Mountain States Legal Foundation ("Mountain States") raises several other challenges to NWF's standing in addition to the injury-in-fact challenge. These involve the causation and redressability requirements for constitutional standing, and the prudential "generalized grievance" limitation on standing—i.e., that the injury must not be a generalized grievance about the conduct of government, since these are most appropriately addressed in the representative branches. *Warth*, 422 U.S. at 499-500, 95 S.Ct. at 2205; *Center for Auto Safety v. National Highways Traffic Safety Admin.*, 793 F.2d 1322, 1335 (D.C.Cir.1986). We reject these other standing claims.

To begin with, there is no doubt that any injury alleged by NWF is caused by, and could be easily redressed by, the Department's modification of its plans under the Program. Mountain States argues that the injury to NWF members will not be caused directly by the Government but, rather, by mining and other development companies affected by regulations under the Program. Therefore, according to Mountain States, because NWF has not alleged facts sufficient to identify any adverse action that will be taken by these companies, plaintiff's injury is not "fairly traceable" to that action, nor is it "likely to be redressed" by an order binding the Government. It is understandable why neither the District Court in its decision below nor the Government on this appeal endorses Mountain States' position, for it is patently flawed.

Once the lands in dispute are removed from Government regulation or protection under the Program, and made available for private mining and other developmental uses, NWF will have no claim against those in control of the land development projects. Furthermore, to the extent that evidence regarding private developmental uses is relevant,

### 1. Injury-in-Fact

NWF claims it is entitled to judicial review under section 10(a) of the APA, 5 U.S.C. § 702 (1982).<sup>11</sup> Injury-in-fact analysis under the APA mirrors that required by the Constitution. See *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 667 (D.C.Cir.1987). This injury-in-fact requirement is satisfied by the presence of a "distinct and palpable injury." *Warth*, 422 U.S. at 501, 95 S.Ct. at 2206; see also *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1331 (D.C.Cir.1986). The injury may result from invasion of a statutory

it has already been addressed by this court in *Burford I*. Based on both the challenged NWF affidavits and the sworn statements of Government officials delineating the precise scope of pending third-party activity in response to the Program, this court specifically rejected the argument now advanced by Mountain States. See *Burford I*, 835 F.2d at 313-14, 324-25. The relevant portion of that opinion has not been called into question or resisted in any way by any litigant. The intervenor has offered no valid basis for reconsideration of our earlier rejection of this argument, and the Government has not even seen fit to raise the issue. Intervenor's position obviously lacks any merit, and we accordingly reject it.

Nor do we find any merit in the intervenor's claims that the Federation should be denied standing under the prudential "generalized grievance" principle. It is plain in this case that NWF has not based its claim on any generalized grievance about the Government's activities, but rather on the concrete injury to its members. The Supreme Court has "made it clear that standing is not to be denied simply because many people suffer the same injury." *SCRAP*, 412 U.S. at 687, 93 S.Ct. at 2416. As long as there is a "logical nexus between the status asserted and the claim sought to be adjudicated," *Flast v. Cohen*, 392 U.S. 83, 102, 88 S.Ct. 1942, 1953, 20 L.Ed.2d 947 (1968), plaintiffs will have met the "generalized grievance" criteria. We find that, on the facts of this case, NWF has alleged such a "logical nexus."

<sup>11</sup> Section 702 gives the right of judicial review to a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."

right as well as a constitutional one, see, e.g., *Schlesinger v. Reservists Comm. to Stop The War*, 418 U.S. 208, 224 n. 14, 94 S.Ct. 2925, 2934 n. 14, 41 L.Ed.2d 706 (1974); *Sierra Club v. Morton*, 405 U.S. 727, 732 & n. 3, 92 S.Ct. 1361, 1365 & n. 3, 31 L.Ed.2d 636 (1972), but it must be more than merely "abstract" or "conjectural" to suffice, *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). The injury need not be important or large; an "identifiable trifle" can meet the constitutional minimum. *SCRAP*, 412 U.S. at 689 n. 14, 93 S.Ct. at 2417 n. 14. "And an injury shared by a large number of people is nonetheless an injury." *Center for Auto Safety*, 793 F.2d at 1331 (citing *Sierra Club*, 405 U.S. at 734, 92 S.Ct. at 1366).

Elaborating on the injury-in-fact standard, the *Burford I* court explained that "[t]he Federation must allege facts demonstrating a definable and discernible injury to its members and an adequate connection between that injury and the members. See [*SCRAP*, 412 U.S. at 688-89, 93 S.Ct. at 2416]. The personal injury may be 'actual or threatened.' [*Valley Forge*, 454 U.S. at 472, 102 S.Ct. at 758]." 835 F.2d at 311. The *Burford I* court then analyzed "a pair of environmental lawsuits relevant to this case," *id.*, handed down by the Supreme Court that elaborate on the requirement in this context. In *Sierra Club*, the Court denied standing to the Sierra Club on its allegation that the Government's decision to permit development of a quasi-wilderness national park would "destroy or . . . adversely affect" the natural resources in the park and would "impair . . . enjoyment . . . for future generations." 405 U.S. at 734, 92 S.Ct. at 1366. Although acknowledging that this was a cognizable injury, the Court nonetheless found that it did not amount to injury-in-fact sufficient to uphold standing because the Sierra Club had "failed to allege that it or its members would be affected in any of their ac-

tivities or pastimes by the . . . development." *Id.* at 735, 92 S.Ct. at 1366. In contrast, the Court found in *SCRAP* that the plaintiff-organization had established standing to challenge an ICC rate increase. No doubt tailoring its complaint to conform with the decision in *Sierra Club*, the *SCRAP* plaintiffs had alleged that their members used "the forests, rivers, streams, mountains, and other natural resources surrounding the Washington Metropolitan area" for various recreational and aesthetic purposes, and that these uses would be disturbed by a chain of third-party responses to the challenged agency action. *SCRAP*, 412 U.S. at 678, 93 S.Ct. at 2411. The *Burford I* court summarized the teachings of these cases as making "clear that in order to establish injury in fact for representational standing, an organization must allege facts showing that one or more of its members is among the persons injured by the challenged agency action." 835 F.2d at 311.

The affidavits submitted by the Federation in this case clearly alleged facts showing that its members were "among the persons injured" by Interior. Thus, we hold that in this case as pleaded on July 22, 1988, *i.e.*, at the time of the District Court's hearing on the cross-motions for summary judgment, NWF demonstrated sufficient detail of injury-in-fact to survive a motion for summary judgment on standing grounds. In other words, even leaving aside the applicable law of the case established by this court in *Burford I*, see Part II.A.2 *infra*, and the supplemental affidavits submitted by petitioners after the hearing on the motions for summary judgment, see Part II.A.3 *infra*, there was enough detail in support of standing to raise material issues of fact sufficient to require the trial judge to consider the case on the merits. In fact, the original Peterson affidavit alone raised "genuine issue[s] [of] material fact," Fed.R.Civ.P. 56(c), with respect to the

standing issue, enabling petitioners to survive a motion for summary judgment.<sup>12</sup>

Peterson's affidavit stated:

My recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of South Pass-Green Mountain, Wyoming have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department. In particular, the South Pass-Green Mountain area of Wyoming has been opened up to the staking of mining claims and oil and gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands.

J.A. 210. The District Court found this statement not to be specific enough because the Interior

decision [to open the South Pass-Green Mountain area of Wyoming to mining claims and oil and gas leasing] opened up to mining approximately 4500 acres within a two million acre area, the balance of which, with the exception of 2000 acres, has always been open to mineral leasing and mining. . . . There is no showing that Peterson's recreational use and en-

<sup>12</sup> As a preliminary matter, we note the District Court's finding that standing alone, the [Peterson and Erman] affidavits do not provide any basis for standing to challenge, as violative of the Federal Land Policy Management Act, the legality of *each* of the 1250 or so individual classification terminations and withdrawal revocations.

J.A. 378 (emphasis added). As we stated in *Burford I*, see 835 F.2d at 324, to the extent that this summarizes the trial court's reasoning, it reflects an erroneous application of law. The applicable law governing standing requires that plaintiffs be injured by only *one* of the terminations. See *UAW v. Brock*, 477 U.S. at 282-86, 106 S.Ct. at 2529-31; *Warth*, 422 U.S. at 511, 95 S.Ct. at 2211.

joyment extends to the particular 4500 acres covered by the decision to terminate classification.

Memorandum Opinion, J.A. 376-77.

On the record of this case, the trial court's reasoning does not support the result reached. Interior planned to open to leasing all but 2000 of the remaining unleased 6500 acres in a two million acre area. The language of Peterson's affidavit can be read to *presume* that the 4500 newly opened areas included the areas that Peterson uses; otherwise, *her* use and enjoyment would not be "adversely affected" in any way. In other words, the universe of the land to which Peterson's affidavit refers can only encompass the 6500 acres that was not yet opened to mining and leasing claims. Of these 6500 acres, only 4500 are affected by the Program. If Peterson was not referring to lands in this 4500-acre affected area, her allegation of impairment to her use and enjoyment would be meaningless, or perjurious. The District Court in no way questions the *veracity* or *clarity* of the affidavit, only its *specificity*. Cf. *SCRAP*, 412 U.S. at 689, 93 S.Ct. at 2416 (court will not consider whether allegations in affidavits are untrue unless alleged by opposing party). But the trial court overlooks the fact that unless Peterson's language is read to refer to the lands affected by the Program, the affidavit is, at best, a meaningless document.

At a minimum, Peterson's affidavit is ambiguous regarding whether the adversely affected lands are the ones she uses. When presented with ambiguity on a motion for summary judgment, a District Court must resolve any factual issues of controversy in favor of the non-moving party, even when the issue of harm and the issue on the merits are intertwined. See *Better Gov't Ass'n v. Department of State*, 780 F.2d 86, 94 (D.C.Cir.1986); *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d

795, 810 (D.C.Cir.1983); accord *National Wildlife Federation v. Snow*, 561 F.2d 227, 236-37 (D.C.Cir.1976). This means that the District Court was obliged to resolve any factual ambiguity in favor of NWF, and would have had to assume, for the purposes of summary judgment, that Peterson used the 4500 affected acres. Accordingly, we find that Peterson has alleged injury-in-fact sufficient to give her standing to sue, and therefore that NWF also has standing under the *Hunt* criteria.<sup>13</sup>

## 2. The Law of the Case

Furthermore, and equally importantly, our decision on this appeal is precisely in accord with what another panel of this court found the first time this case was heard on appeal in *Burford I*. The *Burford I* court held that "the affidavits supplied by the Federation specifically identify locations where its members' interests are threatened by the Department's actions in lifting restrictions on mining and other forms of natural resource exploitation." 835 F.2d at 325. The affidavits referred to by the court are the very

<sup>13</sup> Because we find the Peterson affidavit to be adequate support for the standing claim, it is unnecessary for us to decide whether the Erman and Greenwalt affidavits, both of which differ somewhat from Peterson's, are specific enough to merit standing. See *Sierra Club*, 405 U.S. at 740 n. 15, 92 S.Ct. at 1369 n. 15, ("The test of injury in fact goes only to the question of standing to obtain judicial review"; once standing is established, "the party may assert the interests of the general public in support of his claims for equitable relief."); *Sierra Club v. Adams*, 578 F.2d 389, 392 (D.C.Cir.1978).

We only note here that the *Burford I* court found that the Federation had demonstrated injury-in-fact based on both the Erman and Peterson affidavits. *Burford I*, 835 F.2d at 314; see also *id.* at 329-30 (Williams, J., concurring and dissenting in part) (noting that intervenor Mountain States conceded in oral argument that "some of the acreage opened to mining was in the vicinity of lands used by [Erman] in Arizona"). See also Part II.A.2 *infra*.

same ones that we now review; the *Burford I* court expressly held they provided adequate grounds for NWF to establish irreparable harm at the preliminary injunction stage. Even Judge Williams, concurring in part and dissenting in part from *Burford I*, agreed that the record established NWF's standing, albeit "minimally." 835 F.2d at 329-30. For another panel of this court subsequently to contradict this express finding when circumstances have not changed would contravene the law of the case. See 2B MOORE'S FEDERAL PRACTICE ¶ 0.404[1] at 119 ("[w]hen a case is appealed and remanded, the decision of the appellate court establishes the law of the case and it *must* be followed by the trial court on remand") (emphasis in original); *Doe v. New York City Dep't of Social Serv.*, 709 F.2d 782, 788-89 (2d Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983).

We recognize that *Burford I* analyzed the showing necessary to survive a challenge to standing on a motion to dismiss, which was the posture of this case when it was first appealed. The Government now argues that, because the majority opinion in *Burford I* discussed standing in connection with a motion to dismiss, 835 F.2d at 312, the court never confronted the *Griles* test, which sets a somewhat higher standard for obtaining standing on a motion for summary judgment than on a motion to dismiss. See *Griles*, 824 F.2d at 16 ("[W]hile a motion to dismiss may be decided on the pleadings alone, construed liberally in favor of the plaintiff, a motion for summary judgment by definition entails an opportunity for a supplementation of the record, and accordingly a greater showing is demanded of the plaintiff."). However, what is critical for purposes of review here is that the court in *Burford I* also found standing to support the District Court's grant of a preliminary injunction in favor of petitioners.

The Government's argument completely fails to recognize that, in this case, the burden of establishing irreparable harm to support a request for a *preliminary injunction* is, if anything, *at least as great* as the burden of resisting a *summary judgment motion* on the ground that the plaintiff cannot demonstrate "injury-in-fact." To obtain a preliminary injunction, NWF not only had to demonstrate specific harm, but also carry the *burden of persuasion*, showing a likelihood of success on the merits. On a motion for summary judgment, a plaintiff need only create a jury issue.

When the *Burford I* court found standing to support a preliminary injunction, it also found sufficient injury-in-fact to support the test of standing under *Griles*. As Judge Williams' separate opinion states, "*the specificity required for standing allegations to secure a preliminary injunction will normally be no less than that required on a motion for summary judgment.*" 835 F.2d at 328 (emphasis added). To the extent that *Griles* requires a higher degree of specificity to show injury-in-fact for standing at the summary judgment stage than would be required on a motion to dismiss, the court in *Burford I* found this burden to be met in upholding petitioners' standing to secure a preliminary injunction. The *Burford I* decision upholding petitioners' standing is therefore the law of the case, which disposes of this appeal.

### 3. The Supplemental Affidavits

Because *Burford I* expressly found that petitioners had satisfied the standing requirements, there was no reason for petitioners to suspect that there remained any standing question on remand. If the District Court felt that the standing question was still open, or that more information was required to assess the issue, then it could have per-

mitted petitioners to supplement the record. See *Griles*, 824 F.2d at 17 n. 10 ("a district court can assure that appropriate extra-pleading materials are consulted in determining the threshold jurisdictional issue"). The law of this circuit allows plaintiffs to supplement the record to cure alleged defects on standing. See, e.g., *National Wildlife Federation v. Hodel*, 839 F.2d 694, 703 (D.C.Cir.1988). The equities of this case unquestionably compel such an allowance: the papers on which the trial court relied were two years old by the time it requested supplemental memoranda on the standing issue, and there was no indication prior to the trial court's request that NWF should have doubted the adequacy of the affidavits it had already submitted. Moreover, appellees had full opportunity to refute the evidence in these affidavits; the District Court had specifically given appellees ten days to file "any opposition" to NWF's supplemental memorandum. J.A. 345. In this context, we find that it was unfair and an abuse of discretion for the trial court to refuse to consider the affidavits submitted by NWF when the court asked for supplemental memoranda on the standing issue.

No party to this litigation seriously disputes that NWF's supplemental affidavits, if considered, easily satisfy the level of specificity needed for standing under any of the Supreme Court's articulated tests. Thus, even if the original affidavits were insufficient, and even if we assume that this court's decision in *Burford I* did not decide the issue, these supplemental affidavits offer enough detail to establish NWF's standing.<sup>14</sup>

<sup>14</sup> In light of our decision that the Federation has standing to sue in its own right, it is unnecessary to consider whether plaintiff-intervenor Congressman Bruce Vento also has standing, or whether his standing claims are interdependent with those of the Federation in any way. Congressman Vento has separately appealed the dismissal of his case.

### B. ASARCO's Motion to Intervene

The District Court found ASARCO's intervention claim to be untimely under Rule 24(a) of the Federal Rules of Civil Procedure, which provides that a party may intervene as a matter of right if, *inter alia*, the motion to intervene is timely filed.<sup>15</sup> We disagree with the trial court's finding only with respect to the Spanish Gulch claims, for ASARCO acted promptly to intervene in the suit as soon as the BLM construed the District Court's preliminary injunction order to invalidate these claims. However, we agree with the District Court on ASARCO's other, more general claims.

The timeliness of a motion to intervene does not depend solely on "the amount of time which has elapsed since the litigation began [but] . . . also [on] . . . the related circumstances, including the purpose for which intervention is sought . . . and the improbability of prejudice to those already parties in the case." *Hodgson v. United Mine Workers of America*, 473 F.2d 118, 129 (D.C.Cir.1972); *see also NAACP v. New York*, 413 U.S. 345, 366, 93 S.Ct. 2591, 2603, 37 L.Ed.2d 648 (1973) (whether a motion to intervene is timely "is to be determined from all the circumstances"); *Natural Resources Defense Council v. Costle*, 561 F.2d 904, 907 (D.C.Cir.1977).

In this case, the salient factor is not when ASARCO's motion to intervene was filed with respect to the filing of NWF's original suit, or even with respect to the District Court's issuance of the preliminary injunction. Rather, the

<sup>15</sup> Fed.R.Civ.P. 24(a)(2) also requires that the applicant must claim an interest relating to the property that is the subject of the action; must show that the judicial disposition of the action may impair or impede the applicant's ability to protect its interest; and must show that the applicant's interests are not adequately represented by existing parties.

relevant time from which to assess ASARCO's right of intervention is when ASARCO knew or should have known that any of its rights would be directly affected by this litigation. The record indicates without refutation that ASARCO filed its motion to intervene on June 6, 1988, only 73 days after it received the March 21, 1988, letter from Interior through which ASARCO actually discovered that its Spanish Gulch claims were suspended by the preliminary injunction. Thus, the only remaining question is whether ASARCO can be ascribed with constructive notice before this event. Nothing in the record before us indicates that this question could be answered in the affirmative.

The only possible event that might be construed to have put ASARCO on notice that its interests were at stake in this case would be the February 10, 1986, publication of the preliminary injunction order in the *Federal Register*. However, as the opinion of the District Court notes, the publication in the *Federal Register* was not specific enough vis-a-vis the exact lands affected to "alert even the most careful reader that defendants' classification terminations should inspire protest." *National Wildlife Federation v. Burford*, 676 F.Supp. at 282. Thus, there was no way that this publication could have given ASARCO notice that its Spanish Gulch claims were in jeopardy.

It is clear, then, that ASARCO could not have been required to intervene to protect its Spanish Gulch claims before it received the letter from the BLM notifying it that these claims would be disrupted. Accordingly, we reverse the District Court's finding that ASARCO's intervention with respect to these claims was untimely. We do agree with the District Court, however, that any other generalized claims (besides the particularized Spanish Gulch claims) that ASARCO wished to raise in this litigation should have been brought in a timely fashion after the

*Federal Register* publication of these proceedings; this publication provided sufficient notice of the agency action to arouse any *general* challenges ASARCO may have had. We therefore hold that ASARCO is entitled to bring only its Spanish Gulch claims in District Court because only these claims were timely filed.

We emphasize that we find only that ASARCO's Spanish Gulch claims were timely filed. Because the District Court has not yet considered ASARCO's motion for intervention on the merits, we do not require intervention; instead, we leave the scope of relief to be determined by the District Court. We also note that since we have not reinstated the preliminary injunction that initially produced ASARCO's alleged injury, administrative remedies may now become available to ASARCO that will render intervention altogether unnecessary. Therefore, we remand to the District Court for consideration of ASARCO's motion to intervene under the remaining requirements of Rule 24(a) of the Federal Rules of Civil Procedure.

### III. CONCLUSION

We reverse and remand the District Court's summary judgment against NWF on grounds of standing, because we find that the Federation has shown injury-in-fact more than enough to withstand summary judgment on this issue. Moreover, to find otherwise would contravene the law of the case. The District Court must now address NWF's claims on the merits and fashion whatever relief it deems appropriate. We further find that the District Court's refusal to consider NWF's supplemental affidavits was an abuse of discretion, and direct the court to take into consideration any appropriate further submissions from the parties necessary to a proper resolution. We

decline, however, to reinstate the preliminary injunction because the case should now proceed with dispatch.

We also reverse the trial court's finding that ASARCO's motion to intervene with respect to its Spanish Gulch claims was untimely filed. We remand this issue to the District Court for consideration of the question whether ASARCO is an appropriate intervenor of right given our disposition of the other issues in this case.

*So ordered.*

## APPENDIX B

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

Civ. A. No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS

Nov. 4, 1988

## MEMORANDUM OPINION

JOHN H. PRATT, District Judge.

This case, which concerns the status of approximately 180 million acres of public land, was first filed on July 15, 1985, more than three years ago. A brief summary of the ensuing proceedings is appropriate.

On December 4, 1985, this Court granted plaintiff's motion for a preliminary injunction enjoining any new withdrawal revocations and classification terminations, as well as any activities inconsistent with previous withdrawals and terminations. *National Wildlife Federation v. Burford*, 676 F.Supp. 271 (D.D.C.1985). At the same time we denied plaintiff's motion to dismiss. On February 10, 1986, pursuant to the defendants' motion to clarify, the previous injunction of December 4, 1985 was modified to make it clear that it reached only the federal defendants, not the activities of absent third parties, and was not in-

tended "to overturn or in any way to upset fee interests."<sup>1</sup> *National Wildlife Federation v. Burford*, 676 F.Supp. 280, 284 (D.D.C.1986).

On December 11, 1987, the Court of Appeals for this Circuit in a lengthy split opinion (Judge Williams dissenting), affirmed this court's grant of preliminary relief. *National Wildlife Federation v. Burford*, 835 F.2d 305 (D.C.Cir.1987) ("*Burford*"). It first addressed certain preliminary matters such as the challenge to plaintiff's standing, the effect on absent third parties, plaintiff's failure to exhaust its administrative remedies, and laches. *Burford*, 835 F.2d at 310-18. Passing to the merits, the Court held that the plaintiff had met the conventional criteria for the grant of preliminary relief and sustained the injunction. It conceded that it was a "close case" but held that this court did not abuse its discretion in holding that the plaintiff had shown a likelihood of success on the merits. *Id.* at 319, 327.

On April 29, 1988, in a brief slip opinion, the Appellate Court denied defendants' petition for a rehearing. *National Wildlife Federation v. Burford*, 844 F.2d 889 (D.C.Cir.1988) (*per curiam*). It noted the seriousness of the case and its belief that "some of the criticisms of the breadth and scope of the preliminary injunction offered in the vigorous dissent are not without force." *Id.* at 889. Commenting on the far-reaching effect of this court's action in placing the status of vast tracts of land on "hold" and the confusion arising from this unsettled state of affairs, it expressed its belief "that the disposition of these millions of acres should not continue to rest any longer than necessary on the foundation of a preliminary injunc-

<sup>1</sup> The December 4, 1985 Order was subsequently amended on November 26, 1986, January 6, 1987, and April 11, 1988 to further limit its reach.

tion which was entered on consideration of the brief affidavits and cursory materials presented to the court below." *Id.* (emphasis supplied). We were directed to proceed with this litigation "with dispatch." *Id.* This admonition was repeated by the Court of Appeals as recently as November 1, 1988, when it denied the defendants' emergency motion for a stay pending appeal. *National Wildlife Federation v. Burford*, No. 88-5291, slip op. (D.C.Cir. Nov. 1, 1988) (*per curiam*).

#### *Present Posture*

At issue is plaintiff's application for a permanent injunction. Pending before the Court are the motion of the defendants to dismiss and motions for summary judgment submitted by both parties. The matter had been extensively briefed.<sup>2</sup> Argument was held on July 22, 1988, at the conclusion of which the parties were directed to submit additional memoranda on the issue of plaintiff's standing to bring this suit. Transcript of July 22, 1988 at 91-2. All parties have responded.<sup>3</sup>

<sup>2</sup> Defendants' motion for summary judgment filed September 12, 1986 is 86 pages in length and is accompanied by four declarations of Vincent J. Hecker, Chief, Division of Lands of the Bureau of Land Management (BLM), and the separate declarations of G. William Lamb, District Manager of BLM's Arizona Strip District, Ben Collins, District Manager of BLM's Las Vegas District Office, Ed Hastey, Director of BLM's California State Office, Jack Kelly, Manager of BLM's Lander, Wyoming Resource Area, and David C. Williams, Chief of BLM's Division of Planning and Environmental Coordination (BLM), as well as voluminous exhibits. Plaintiff's motion, as well as its responses to defendants' motion to dismiss and motion for summary judgment together with exhibits, are also extensive.

<sup>3</sup> Plaintiff, in addition to its memorandum filed August 22, 1988 has submitted additional evidentiary material, including declarations from four of its members. These submissions are untimely and in

#### *Standing*

In its opinion the Court of Appeals, after applying the "injury in fact" analysis required by Section 702 of the Administrative Procedure Act, concluded that based on the allegations of the complaint, "the Federation has alleged facts sufficient to establish injury in fact to its members." *Burford*, 835 F.2d at 312. In so doing, it pointed out that it had to assume that the allegations of the complaint were true and must be construed in the light most favorable to the organization. *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975)). More importantly, the issue of standing arose in the posture of defendant's motion to dismiss, which affected the degree of factual specificity required to be shown in order to establish the likelihood of personal injury to plaintiff's members. This distinction was emphasized in *SCRAP*,<sup>4</sup> where a suit alleging injury to members based on their use and enjoyment of natural resources was held by the Supreme Court sufficient to survive a motion to dismiss. At the same time, the highest Court acknowledged that, on a motion for summary judgment, the plaintiff might have to show injury with greater specificity. See *SCRAP*, 412 U.S. at 689 & n. 15, 93 S.Ct. at 2416 & n. 15. Our Court of Appeals has more recently spelled out the importance of this distinction. See *Wilderness Society v. Griles*, 824 F.2d 4, 16-17 (D.C.Cir.1987) (Plaintiff's failure to show specificity of injury in response to defendant's motion for summary judgment precludes their stand-

violation of our Order. We decline to consider them. See Federal Defendants' Reply to Plaintiff's Statement of Points and Authorities in Support of Its Standing to Proceed, at 1 n. 1.

<sup>4</sup> *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973).

ing, but case was reversed to permit plaintiff an opportunity for further discovery on this issue).<sup>5</sup> The Court's affirmation of standing in the instant case must therefore be read in the context of the procedural posture of the case when that Court considered this issue. The dissenting opinion, while observing that "[a]t this point in the proceeding the issue of standing is largely academic" and that "the defendants appear to have conceded the bare minimum necessary for standing," emphasized that the "specificity required for standing allegations to secure a preliminary injunction will normally be no less than that required on a motion for summary judgment." *Burford*, 835 F.2d at 327-28 (Williams, J., concurring and dissenting). This is because plaintiff's burden of showing likelihood of success on the merits presupposes a preliminary finding that plaintiff has standing. *See id.* at 328. In light of the foregoing, we turn now to reconsider our earlier finding that plaintiff has standing to pursue this litigation. Plaintiff predicates its claim of standing on two types of injury, informational or procedural injury to it as an organization and environmental harm to its members, both caused by defendants' administration of the Land Withdrawal Review Program.<sup>6</sup> Plaintiff's Memorandum in Support of Standing at 2.

Admittedly, the decisions on standing are not a model of consistency. However, it is generally agreed that, in order to satisfy the "case or controversy" requirement of the Constitution and Section 702 of the Administrative

<sup>5</sup> The *Wilderness Society* litigation was terminated on October 31, 1988 through the entry of the "Stipulation of All Parties for Dismissal." The issues in that case were held to be mooted by the passage by Congress on August 16, 1988 of Pub.L. No. 100-395.

<sup>6</sup> This program concerns the termination of land classifications and the revocation of land withdrawals.

Procedure Act, the plaintiff must both plead and prove that it or its members have suffered some actual or threatened injury as the result of defendants' allegedly unlawful conduct. These requirements have been summarized by the Supreme Court in *Valley Forge Christian College v. Americans United for the Separation of Church and State*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982), as follows:

at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 [99 S.Ct. 1601, 1607, 60 L.Ed.2d 66] (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 [96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450] (1976).

It is not disputed that an organization may have standing to bring suit on behalf of its members.<sup>7</sup> Plaintiff's claim of injury to it as an organization rests upon its alleged inability 1) to obtain information as to the federal defendants' Land Withdrawal Review Program and the actions completed under such program, and 2) to participate in the federal defendants' decision making. It claims that it, as an organization, is entitled "to see and use" the kind of information that would have been available had the federal defendants completed environmental impact

<sup>7</sup> To do so, it must meet the three-prong test for representational standing set forth by the Supreme Court. *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977). One of these requirements is that one or more of the organization's members has himself standing to sue.

statements. Plaintiff's Statement in Support of Standing at 2-3. In sole support of this position, plaintiff has submitted the declaration of Lynn Greenwall, its Vice President for Resources Conservation. An analysis of the Greenwall declaration shows, after a description of the plaintiff's organization and the nature and size of its membership, the plaintiff's educational program to inform its members concerning conservation issues and their financial support for this purpose, a bare claim that plaintiff's ability to meet the obligations to its members

has been significantly impaired by the failure of the Bureau of Land Management and the Department of Interior to provide adequate information and public participation with respect to the Land Withdrawal Review Program.

#### Plaintiff's Statement in Support of Standing at 5.

It is apparent on its face that the Greenwall declaration is conclusory and completely devoid of specific facts. Plaintiff has the burden of proof on this issue and has failed to make a showing as to the existence of the elements essential to its case, *i.e.*, its lack of adequate information and opportunity for public participation. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). It has not done so. Its claim of informational and procedural injury to it as an organization is therefore without merit and provides no basis to support its claim of standing.<sup>8</sup>

<sup>8</sup> Although not required to do so, because defendants did not have the burden to disprove plaintiff's conclusory contention, defendants have advised plaintiff of the environmental documentation and the methodology employed and have made its extensive files containing such information available for plaintiff's inspection. The fact that no individual environmental impact statements were done in individual classification or withdrawal terminations adds nothing to plaintiff's claim of injury.

Plaintiff's other claim of injury concerns alleged environmental harm to its members. Defendants do not challenge the fact that injury to the environment can support a claim of member standing, but rather they focus their attack on the particular showing of injury made in this case. Some useful guidelines have been set forth in *Wilderness Society*, 824 F.2d 4. Both *Wilderness Society* and the instant case concern vast tracts of land<sup>9</sup> and do not involve allegations by a plaintiff that governmental action will be taken against it. Rather, they both concern conduct of a third party whose possible response will injure plaintiff. As was said in *Wilderness Society*:

The standing question in these three-party cases frequently turns not on the issue of personal injury but rather on so-called causation issues, *i.e.*, whether the third-party's decision is sufficiently dependent upon governmental action that the plaintiff's injury is "fairly traceable" to that action and is "likely to be redressed" by an order binding the government. . . . [citing *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) and other cases] When personal injury is at issue in a three-party case, it usually depends upon how likely it is that the third-party's response to the challenged governmental action will injure the plaintiff *at all*.

824 F.2d at 11 (citations omitted).

The Court in *Wilderness Society* concluded its discussion of this problem with the following language which is particularly relevant to the facts of the instant litigation:

<sup>9</sup> *Wilderness Society* involved the selection by the State of Alaska of 100 million acres of federal land and Department of Interior's change of policy to exclude submerged lands from the total acreage to be conveyed to Alaska. See *Wilderness Society*, 824 F.2d at 7.

To sum up, whether an allegation of threatened injury suffices for standing turns on the likelihood of the occurrence of that injury. . . . [T]he court must ascertain whether the third party's response to governmental action will . . . affect the plaintiff's intended behavior. Where the alleged injury involves access to land in a three party case, as in *Sierra Club [v. Morton]*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)], *SCRAP*, and the case at bar, the judgment regarding the likelihood of injury turns on *whether the plaintiff's future conduct will occur in the same location as the third party's response to the challenged governmental action*. Otherwise, the threat of injury would be too amorphous or uncertain; it would be no greater for the plaintiff than for any person simply opposed to the governmental action in question. In short, the issue in each case is whether the plaintiff has put forward enough facts to show that his intended behavior will be injured as a direct or indirect result of the challenged governmental action.

*Wilderness Society*, 824 F.2d at 12 (emphasis supplied).

Plaintiff rests its entire claim of standing to sue for environmental injury on the affidavits of two persons; i.e., Peggy Peterson and Richard Erman. Both of their brief affidavits were filed on May 22, 1986.<sup>10</sup> Neither appears to be referred to in plaintiff's Motion for Summary Judgment filed on June 23, 1986, which does not consider the question of plaintiff's standing.

The Peterson affidavit claims that she uses federal lands *in the vicinity* of the South Pass-Green Mountain area of Wyoming for recreational purposes and for aesthetic enjoyment and that her recreational and aesthetic enjoyment

<sup>10</sup> They are 3 and 3-1/2 pages in length, respectively, and use the same boiler plate language and format.

has been and continues to be adversely affected as the result of the decision of BLM to open it to the staking of mining claims and oil and gas leasing. Peterson Affidavit, filed May 22, 1986. This decision<sup>11</sup> opened up to mining approximately 4500 acres within a two million acre area, the balance of which, with the exception of 2000 acres, has always been open to mineral leasing and mining. See Kelly Affidavit attached to Federal Defendant's Motion for Summary Judgment filed September 4, 1986.<sup>12</sup> There is no showing that Peterson's recreational use and enjoyment extends to the particular 4500 acres covered by the decision to terminate classification to the remainder of the two million acres affected by the termination. All she claims is that she uses lands "in the vicinity." The affidavit on its face contains only a bare allegation of injury, and fails to show specific facts supporting the affiant's allegation.

The Erman Affidavit is similarly flawed. Erman asserts that he uses federal lands, including those in the vicinity of the Grand Canyon National Park, the Arizona Strip (Kanab Plateau), and the Kaibab National Forest for recreational purposes and for aesthetic enjoyment. He further asserts that his recreational use and aesthetic enjoyment of federal lands, particularly those *in the vicinity* of the Grand Canyon National Park and the Arizona Strip have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department, with particular reference to the opening to the staking of

<sup>11</sup> Termination of Classification No. W-6228 referred to in Federal Defendants' Motion for Summary Judgment, Statement of Facts at 6.

<sup>12</sup> The Kelly Affidavit sets forth in great detail the voluminous process started in 1977 and concluded in 1984 that the BLM office in Lander, Wyoming followed in reaching its decision to terminate Classification No. W-6228. It completely answers plaintiff's claims of inadequate land use plans, lack of conformance determinations and insufficient opportunities for public participation.

mining claims" and the failure of the Bureau and the Department to provide notice of their proposals to terminate classifications and other withdrawals and to provide opportunities for public involvement. Erman Affidavit filed May 22, 1986. The magnitude of Erman's claimed injury stretches the imagination. As the affidavit of J. William Lamb shows, the Arizona Strip consists of all lands in Arizona north and west of the Colorado River on approximately 5.5 million acres, an area one-eighth the size of the State of Arizona. Furthermore, virtually the entire Strip is and for many years has been open to uranium and other metalliferous mining. The revocation of withdrawal concerned only non-metalliferous mining in the western one-third of the Arizona Strip, an area possessing no potential for non-metalliferous mining. *See* Lamb Affidavit, attached to Federal Defendant's Motion for Judgment.<sup>13</sup>

Both the Peterson and Erman Affidavits are vague, conclusory and lack factual specificity. They do not and cannot show "injury in fact" with respect to the two specific areas in Wyoming and Arizona in the vicinity of which these affiants claim to be located. More important, standing alone, these two affidavits do not provide any basis for standing to challenge, as violative of the Federal Land Policy Management Act, the legality of each of the 1250 or so individual classification terminations and withdrawal revocations. It should be noted that plaintiff's claims of injury reach hundreds of decisions affecting 180 million acres spread over seventeen states. Since plaintiff lacks standing in the constitutional sense or as an "aggrieved

<sup>13</sup> The Lamb Affidavit also details the history of the several withdrawals and classifications placed on the public lands comprising the Arizona Strip. These commenced in 1930 and were terminated in 1981 after the passage of the Federal Land Policy and Management Act, 43 U.S.C. § 1701, *et seq.*

party" under Section 702 of the APA, we lack subject matter jurisdiction and dismiss for lack of standing.

### *Merits*

In view of the position taken that this Court lacks jurisdiction for lack of standing, it is not necessary that we reach the merits of plaintiff's claim for injunctive relief. The dissenting opinion of the Court of Appeals has mirrored many of these problems in its discussion of our grant of preliminary injunction presented as it was in response to defendant's motion to dismiss.

An Order consistent with the foregoing has been entered this day.

### **ORDER**

Upon consideration of the parties' respective motions for summary judgment and oppositions thereto, the hearing thereon held July 22, 1988, and the parties' subsequent submissions on the issue of plaintiff's standing, it is by the Court this 4th day of November, 1988

ORDERED that this Court's grant of a preliminary injunction be vacated, and it is

ORDERED that Defendants' Motion for Summary Judgment be granted; and it is

FURTHER ORDERED that the above action shall stand dismissed the lack of standing.

## APPENDIX C

UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT

Nos. 86-5239, 86-5240

NATIONAL WILDLIFE FEDERATION

v.

ROBERT F. BURFORD, ET AL., APPELLANTS  
MOUNTAIN STATES LEGAL FOUNDATION, ET AL.  
(TWO CASES)Decided Dec. 11, 1987  
As Amended Dec. 15, 1987Before MIKVA and WILLIAMS, Circuit Judges, and  
WEIGEL,\* Senior District Judge.

Opinion for the Court filed by Circuit Judge MIKVA.

Opinion concurring in part and dissenting in part filed  
by Circuit Judge WILLIAMS.

MIKVA, Circuit Judge:

The National Wildlife Federation (the Federation), a  
private organization dedicated to conserving the nation's

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\* Of the United States District Court for the Northern District of California, sitting by designation pursuant to 28 U.S.C. § 294(d).

natural resources, brought suit against the Director of the Bureau of Land Management, the Secretary of the Interior, and the Department of the Interior (collectively, the Department), challenging the Department's conduct of its "Land Withdrawal Review Program" (the Program). Pursuant to the Program, the Department lifted protective restrictions pertaining to almost 180 million acres of federal land located in seventeen states. This land is subject to the requirements of the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701 *et seq.* (1982) (FLPMA or the Act), which establishes comprehensive rules for the management and preservation of federal lands and provides for protection of land in the public domain from private ownership and development.

The Federation alleged, *inter alia*, that in lifting protective restrictions under the Program, the Department improperly ignored statutory provisions which subject release of land from the public reserve to careful procedural protections. The district court issued a preliminary injunction, enjoining the Department from modifying, terminating, or revoking any restriction in effect on January 1, 1981, and enjoining the agency from taking any action inconsistent with such restrictions. Appellants, the Department and Mountain States Legal Foundation (Mountain States), a nonprofit group which represents public land user groups, contest the injunction on several grounds. They principally contend that the Federation lacks standing to challenge the Department's actions, that the injunction impermissibly restricts the rights of absent third parties, and that the Federation is not entitled to the injunction under traditional equity principles. We reject each of appellants' arguments and affirm the district court's issuance of the preliminary injunction.

## I. BACKGROUND

### A. *The Applicable Law*

This action concerns the Department's authority to establish and implement land use planning for millions of acres of federal public lands. This authority precedes the enactment of FLPMA. Up until the mid-20th century, management of the nation's public lands consisted basically of a policy of disposal. Under this policy, the government transferred vast acreage of land from federal ownership to private citizens, states, countries, cities, and companies, for purposes such as homesteading and railroad construction. Beginning in the 1930's, however, the federal government began reorienting its policy away from disposal and toward retention and management. The two relevant mechanisms for implementation of this new policy were classifications and withdrawals. "Classifications" designate public lands for retention and frequently segregate the lands from the operation of various land disposal laws. "Withdrawals" directly remove designated lands from disposal under the general land laws.

Classifications for federal lands were made, for the most part, pursuant to the Classification and Multiple Use Act of 1964 (the C & MU Act), 43 U.S.C. §§ 1411-15, now expired. The C & MU Act directed the Secretary of the Interior to develop criteria to be used in determining which of the public lands administered by the Department should be retained in federal ownership and which lands were suitable for disposal. Most classifications for retention segregated lands from sale and from disposal under the agricultural laws (*e.g.*, homestead, desert land entry, and Indian allotment laws). Some classifications further segregated land from exchange, from location under federal mining laws, or from mineral leasing. Many of the lands were classified for multiple use management. Over

the years, pursuant to the C & MU Act, the Department classified almost 180 million acres of publicly managed lands for retention by the federal government.

The first withdrawals were placed on public lands by President Franklin Roosevelt under the Pickett Act, which authorized the President to temporarily withdraw from settlement, location, sale or entry any of the public lands in the United States and to reserve the lands for any public purpose. See 43 U.S.C. §§ 141-143, repealed. A withdrawal withholds land from operation of one or more of the general land and mineral disposal laws, including the 1872 Mining Law, as amended, 30 U.S.C. §§ 22, *et seq.* the Mineral Leasing Act, 30 U.S.C. §§ 181-226-2, and the Geothermal Steam Act, 30 U.S.C. §§ 1001-1025. The purpose of withdrawals is to limit activities under those laws and to preserve other public values, such as recreation and fish and wildlife. At the time this suit was filed, about 68 million acres of land had been withdrawn pursuant to constitutional and statutory authority.

The creation, modification, and revocation of classifications and withdrawals is now controlled by FLPMA. Enacted in 1976, FLPMA provides the Bureau of Land Management (BLM or the Bureau), the subagency of the Department charged with land management responsibilities, with permanent, comprehensive guidelines for carrying out its mandate. The Act requires land use planning for public lands under BLM's jurisdiction and outlines procedures for the development, maintenance, and revision of land use plans. See 43 U.S.C. §§ 1701(a)(2), 1712.

The Act also establishes management criteria. FLPMA states that the federal policy under the Act is that "public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel

will serve the national interest." *Id.* § 1701(a)(1). The Act stipulates additional policy guidelines for BLM's land use planning. First, Congress directed that "management be on the basis of multiple use and sustained yield unless otherwise specified by law." *Id.* § 1701(a)(7). Second,

the public lands [must] be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.

*Id.* § 1701(a)(8). Finally, the Act directs BLM to manage the lands in a manner which recognizes the country's need for natural resources. *Id.* § 1701(a)(12).

FLPMA contains specific provisions governing the disposition of classifications and withdrawals in effect when Congress enacted FLPMA. The savings provision of the Act states that "[a]ll withdrawals, reservations, classifications, and designations in effect as of the date of the approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law." Pub.L. No. 94-579, 90 Stat. 2743. The Act directs BLM to review all existing classifications and to review the existing withdrawals regarding public lands in the eleven contiguous Western states by 1991. *See* 43 U.S.C. §§ 1701(a)(3), 1714(l). Section 202 of the Act requires BLM, subject to this review, to develop land use plans for all public lands "regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses." *Id.* § 1712(a). FLPMA further provides that the Department may modify

or terminate any existing classification in a manner consistent with the land use plan developed under FLPMA. *See id.* § 1712(d). Similarly, the Act authorizes the Department to revoke withdrawals, but only in accordance with the Act. *See id.* § 1714(a).

The Department has implemented FLPMA's comprehensive land use planning requirements by regulations. These Departmental regulations specifically define the land use plans required by FLPMA as Resource Management Plans (Plans). *See* 43 C.F.R. § 1601.0-5(k) (1986).

#### *B. Implementation of the Land Withdrawal Review Program*

Until 1981, the agency took little action to review existing classifications and withdrawals. In 1981, however, the Department proceeded to review of classifications and withdrawals with full force. Although classifications and withdrawals are technically subject to the review provisions of different sections of FLPMA, BLM determined that classifications would be systematically reviewed as part of the Bureau's Land Withdrawal Review Program. *See* BLM Organic Act Directive No. 81-11 (June 18, 1981), Joint Appendix (J.A.) at 97-A.

The Bureau's stated objective was to cancel a large portion of the classifications created under the C & MU Act. The Bureau ordered the elimination, in total, of all C & MU classifications that met four stipulated criteria. BLM retained discretion to maintain the few C & MU classifications not meeting the criteria pending review of the existing land use plan or completion of the Plan pursuant to FLPMA. *See id.*, J.A. at 97-B. The agency directed priority attention be paid to termination of classifications that segregate lands from mining and/or mineral leasing. Pursuant to these directives, the Department has reviewed classifications covering 167.7 million acres of public land

and has terminated classifications for approximately 160.8 million acres. As a result, substantial public land areas have been opened to many previously restricted activities and uses.

The Department directed those reviewing existing withdrawals to determine whether the original purpose of the withdrawal was still being served and if not, to revoke the restriction. Pursuant to its review process, the Department has revoked withdrawals covering approximately 20 million acres of public lands. The effect of the revocations is that the previously withdrawn lands are open to the operation of all or part of the public land laws, provided the lands remain in federal ownership and are not subject to some other action that would prevent the application of the public land laws.

### C. *Proceedings in This Case*

The Federation commenced this action on July 15, 1985, alleging that the agency's revocations of protective withdrawals and termination of protective classifications pursuant to the ongoing Program violated various specific provisions of FLPMA, the National Environmental Policy Act of 1969, 42 U.S.C. §§4321, *et seq.* (NEPA), and the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (APA). Three of the eight counts of the Federation's amended complaint are relevant to this appeal. First, in Count I, the Federation claimed that the Department had violated its duties under FLPMA by failing to prepare Plans in connection with its withdrawal revocations and classification terminations. Second, in Count II, the Federation claimed that the Department had violated FLPMA by revoking withdrawals and terminating classifications in eleven Western states without prior submission of a recommendation to the President or the Con-

gress. Third, in Count VII, the Federation charged that the Department had violated FLPMA by failing to provide any opportunity for public involvement in the Department's land status decisions. In its prayer for relief, the Federation sought, *inter alia*, a declaration that the Department's Program violates applicable law and an order both reinstating all withdrawals, classifications, or other designations in effect on January 1, 1981 and enjoining the Department from taking any action inconsistent with such designations until the Department complied with its statutory obligations.

Simultaneous with the filing of its complaint, the Federation moved for a preliminary injunction, seeking to halt any new revocations or terminations and to enjoin any activities inconsistent with the previous withdrawals and classifications. The Federation did not seek to invalidate existing claims nor did it seek to overturn completed sales or exchanges. The Department opposed the motion, arguing mainly that the Federation had not established the prerequisites for injunctive relief. The agency then moved to dismiss the entire action for failure to join the holders of mining claims and mineral leases as indispensable parties. The Department also moved to dismiss Count II of the complaint for lack of standing. Shortly thereafter, the district court granted Mountain States' motion to intervene. John Seiberling, Chairman of the House Committee on Public Lands, subsequently moved to intervene for the limited purpose of challenging the Department's failure to submit recommendations for withdrawal revocations to the Congress.

In a memorandum opinion, the district court resolved the three pending motions. *See National Wildlife Federation v. Burford*, 676 F.Supp. 271 (D.D.C. Dec. 1985). First, the court granted Representative Seiberling's motion to intervene as a plaintiff in the case, rejecting the Depart-

ment's contention that the Congressman did not have standing to pursue his claim. Second, the court denied the Department's motion to dismiss. The court ruled that although the holders of mining claims and mineral leases were necessary parties, they were not indispensable parties under Federal Rules of Civil Procedure 19; therefore, the court's lack of personal jurisdiction over these absent third parties did not necessitate dismissal of the complaint. The court further noted that under the "public rights" doctrine, first articulated in *National Licorice Co. v. NLRB*, 309 U.S. 350, 60 S.Ct. 569, 84 L.Ed. 799 (1940), joinder was not required. The court also held that the issue of the Foundation's standing to pursue Count II of its complaint had been rendered moot by Representative Sieberling's [sic] intervention on an identical claim.

Finally, the district court granted the Federation's motion for a preliminary injunction. The court found that the Federation had shown substantial likelihood of success on Counts I and VII of its complaint. In addition, the court found that, unless enjoined, the Department's actions in lifting protective land restrictions would irreparably injure the Federation's members. Further, the court concluded that the harm to third parties was not so serious as to outweigh the other factors supporting injunction. The court further found that the public interest clearly favored granting the injunction. The court therefore issued a preliminary injunction enjoining the federal defendants as well as persons holding interests in land from taking any further action inconsistent with pre-1981 classifications and withdrawals.

The Department moved for amendment, reconsideration, and clarification of the preliminary injunction. Mountain States also moved for reconsideration of the injunction. In addition, Mountain States asked that the court reconsider its denial for nonjoinder. The Depart-

ment introduced no new arguments, but Mountain States raised two claims for the first time. Mountain States argued that the Federation lacked standing in that it could prove no injury in fact because the lands at issue were subject to commercial exploitation even before the terminations and revocations under the Program. Mountain States also asserted that the Federation had failed to exhaust its administrative remedies with regard to classification terminations. The district court rejected both arguments and denied the motions to reconsider. The court also declined Mountain States' request to certify the joinder question for appeal under 28 U.S.C. § 1292(b). With regard to the defendants' request to clarify the preliminary injunction, the court modified the order to remove the prohibition on the activities of absent third parties. The injunction thus only directly enjoins the federal defendants. The modification also made clear that post-1981 terminations and revocations were "suspended," not voided. See *National Wildlife Federation v. Burford*, 676 F.Supp. 280 (D.D.C.1986). This appeal followed. The district court has denied defendants' motion for a stay of the preliminary injunction pending appeal.

Mountain States also seeks relief on the issue of nonjoinder by way of a separate Petition for a Writ of Prohibition. See *In re: Mountain States Legal Foundation*, No. 86-5353. We deny that relief in a separate order of even date.

## II. PRELIMINARY ISSUES

Before examining whether the Federation was entitled to a preliminary injunction on its two FLPMA claims under conventional standards of equity, we pause to address several preliminary issues raised by appellants. First, we consider appellants' challenge to the Federation's stand-

ing. Second, we inquire whether the injunction impermissibly impinges on the rights of absent third parties over whom the district court has no personal jurisdiction. We then examine appellants' claims that the Federation is guilty of laches and that it failed to exhaust administrative remedies.

#### A. Standing

It is well settled that an organization may have standing to bring suit on behalf of its members. See *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock (UAW)*, 477 U.S. 274, 106 S.Ct. 2523, 2529, 91 L.Ed.2d 228 (1986). In *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977), the Supreme Court set out the following three-part test for representational standing: (1) one or more of the organization's members would otherwise have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purposes; and (3) an individual member's participation in the lawsuit is not required. The Department and Mountain States both contest the Federation's ability to meet the first part of the *Hunt* test. Appellants assert that the Federation's individual members would not have standing in their own right, in particular because the Federation has not alleged the requisite injury in fact.

In order to mount its claim against the Department under § 702 of the APA, the Federation must demonstrate that "the challenged action ha[s] caused [its members] injury in fact." *Sierra Club v. Morton*, 405 U.S. 727, 733, 92 S.Ct. 1361, 1365, 31 L.Ed.2d 636 (1972). The injury-in-fact analysis under section 702 mirrors the one required by the Constitution. See *Community for Creative Non-*

*Violence v. Pierce*, 814 F.2d 663, 667 (D.C.Cir.1987). The Federation must allege facts demonstrating a definable and discernible injury to its members and an adequate connection between that injury and the members. See *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973). The personal injury may be "actual or threatened." *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982).

In a pair of environmental lawsuits relevant to this case, the Supreme Court elaborated the injury in fact requirement. In *Sierra Club*, an environmental organization alleged that it had standing to challenge the government's decision to permit development of a quasi-wilderness national park. The injury alleged by Sierra Club was that the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." *Sierra Club*, 405 U.S. at 734, 92 S.Ct. at 1366. The Court acknowledged that this was a cognizable injury, but held that it did not amount to "injury in fact" sufficient to afford standing. The Court found that the Sierra Club had not shown injury in fact because it had "failed to allege that it or its members would be affected in any of their activities or pastimes by the . . . development." *Id.* at 735, 92 S.Ct. at 1366. In challenging an ICC rate increase, the plaintiff-organization in *SCRAP* tailored its allegations to conform to the Court's teachings in *Sierra Club*. In *SCRAP*, the Court found that the plaintiffs had established standing and distinguished themselves from *Sierra Club* by alleging that their members used "the forest, streams, mountains and other resources surrounding the Washington Metro-

politan area" for various recreational and aesthetic purposes and that these uses would be disturbed by a chain of third-party responses to the challenged agency action. *SCRAP*, 412 U.S. at 678, 93 S.Ct. at 2411; *see id.* at 685, 93 S.Ct. at 2415. The Court thus made clear that in order to establish injury in fact for representational standing, an organization must allege facts showing that one or more of its members is among the persons injured by the challenged agency action.

In analyzing whether the Federation has shown sufficient injury in fact under these principles, it is important to keep in mind that the standing issue arose before the district court on the Department's motion to dismiss the Federation's complaint. This posture has two important ramifications. First, we review the allegations of the Federation's complaint. In so doing, we must accept as true all material allegations and construe the complaint in favor of the Federation. *See Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975). Second, and more important, the posture affects the degree of specificity of facts which the Federation must show to establish a sufficient likelihood of personal injury to its members. *See The Wilderness Society v. Griles*, 824 F.2d 4, 16 (D.C.Cir.1987). In *SCRAP*, for example, the Court found that the plaintiff-organization's alleged injury, based only on its members' use and enjoyment of natural resources *surrounding* the Washington Metropolitan area, was enough to survive a motion to dismiss. The Court acknowledged, however, that on a motion for summary judgment, plaintiff might have to show injury with greater specificity, for example, by naming a specific forest that was used and would be affected by the challenged agency action. *See SCRAP*, 412 U.S. at 689 n. 15, 93 S.Ct. at 2417 n. 15. *See also Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 45 n. 25, 96 S.Ct. 1917,

1927 n. 25, 48 L.Ed.2d 450 (1976). Mountain States argues that the Federation's standing should not be viewed from this more generous perspective because there is a preliminary injunction at issue. This argument is flawed. In *SCRAP* itself, the standing issue can before the trial court in exactly the same way as in this case—on motions to dismiss and for a preliminary injunction. The Court made clear that the defendants could not complain that the allegations in the plaintiff's complaint were not specific enough. *See SCRAP*, 412 U.S. at 689 nn. 14 & 15, 93 S.Ct. at 2417 nn. 14 & 15.

The Federation's amended complaint reads as follows:

NWF and its members are suffering and will continue to suffer injury in fact as a result of the challenged actions. Members of the NWF use and enjoy the environmental resources that will be adversely affected by the challenged actions. They regularly use these resources for fishing, hunting, bird and wildlife watching, canoeing and boating, hiking, camping, and other similar activities. These persons' use and enjoyment of these resources will be irreparably injured if the defendants are permitted to terminate protective land use restrictions and thereby open up public lands to exploration, development, and disposal, without the development of land use plans, without prior preparation of adequate environmental impact statements, and without compliance with applicable laws, regulations, and procedures. Among other things, the challenged actions will adversely affect plaintiff and its members by destroying fish and wildlife habitat, and by impairing natural beauty.

The Federation appended to the complaint a list of 788 land status actions, including termination of land classifications and land withdrawals, taken by the Depart-

ment pursuant to the challenged Program. The organization noted that this list was not intended to be inclusive.

Assuming the allegations of the complaint are true and construing them in the light more favorable to the organization, as we must in this posture of the case, we conclude that the Federation has alleged facts sufficient to establish injury in fact to its members. As an initial point, there is no question that harm to one's recreational, aesthetic, and environmental interests can amount to injury in fact for standing purposes. See *Sierra Club*, 405 U.S. at 734, 92 S.Ct. at 1366. The important question for our standing analysis therefore is whether the Federation's members are themselves among the injured. See *id.* at 734-35, 92 S.Ct. at 1366; *Wilderness Society*, 824 F.2d at 15. The Federation has clearly made this showing. It alleges that its 4.5 million members and supporters across the country use and wish to continue to use previously withdrawn or classified lands for recreational or aesthetic purposes, and that these persons are injured in fact when withdrawals are revoked and classifications terminated, thereby threatening continued use of the property and its resources for such purposes. The Federation asserts particularized, discrete injuries to its members as persons who regularly use areas affected by the Program for specific activities and pastimes. The Department is thus mistaken in asserting that the Federation's allegations amount to no more than a "mere interest in a problem," found to be insufficient to constitute injury in fact in *Sierra Club*. See *Sierra Club*, 405 U.S. at 739-40, 92 S.Ct. at 1368. This case is a far cry from *Sierra Club*; the Federation's allegations fit squarely within *SCRAP*, a case which appellants fail to mention.

Given the holding of *SCRAP*, it is difficult to pinpoint appellants' objections to the Federation's allegations of injury. At times, they appear to claim that the organization's

showing fails because it has not identified any specific member who uses a particular parcel of land covered by the challenged agency action. It is unclear where appellants locate this purported requirement. No such specificity was required in *SCRAP*; the plaintiff-organization simply alleged in general terms that its five members used the natural resources surrounding a specified area allegedly affected by the challenged government action. The Federation has done the same, except that rather than identifying the affected land by geographic location or by name, it has referred to the specific land status actions taken by the Department pursuant to the Program, all of which affect specific situses identified by *Federal Register* publications. There is no difficulty discerning the land to which the Federation refers; it is the approximately 180 million acres subject to the Program's terminations and revocations.

Even if this lack of specificity were somehow fatal to the complaint, it was cured by the affidavits of two Federation members filed with the district court after issuance of the preliminary injunction. Appellants argue that the Federation's "post hoc" filings cannot excuse the district court's exercise of jurisdiction. We are not seeking such an excuse; we are inquiring whether the Federation has standing to pursue its action. From our perspective on appeal, we may properly turn to the affidavits which supply evidence in support of the Federation's allegations of injury. Both members stated that they used federal lands, including those in the vicinity of areas covered by withdrawal revocations (specifically, the South Pass-Green Mountain area of Wyoming, the Grand Canyon, the Arizona Strip, and Kaibab National Forest) for recreational uses and for aesthetic enjoyment. Both members claimed that their use and enjoyment of these land "have been and continue to be adversely affected in fact by the unlawful actions of the

Bureau and the Department." These affidavits provide a concrete indication that the Federation's members use specific lands covered by the agency's Program and will be adversely affected by the agency's action. Mountain States contends that even these affidavits are insufficient because the named members claim only to use resources in the "vicinity" of the land covered by the challenged withdrawal revocations. The Federation's allegations in this regard however comport with those in *SCRAP*; they therefore are sufficiently specific for purposes of a motion to dismiss.

In a similar vein, the Department protests that the Federation has not shown "concrete," "discernible" injury because the harm alleged is merely hypothetical. At bottom, appellant challenges the Federation's reliance on allegations of threatened injury that allegedly will occur in the future as a result of third parties' responses to the Department's actions. We recently described the sufficiency of allegations of threatened injury as turning on "the likelihood of the occurrence of that injury." *Wilderness Society*, 824 F.2d at 12. *Wilderness Society*, like this case, involved alleged injury to the plaintiffs' use of land (and its resources) that stemmed from the expected response of third parties to the agency action rather than directly from the agency action itself. We observed that, in such cases, "the judgment regarding likelihood of injury turns on whether the plaintiff's future conduct will occur in the same location as the third party's response to the challenged governmental action." *Id.* at 12; *see also id.* at 15. We concluded that plaintiffs must be able to allege a specific site of injury—"lands that they intended to use that has been affected by [the government's action]." *See id.* at 15. In this regard, the Federation's allegations of injury suffice; because the Program acts directly on the *land* (rather than on third parties), we can be certain that the

challenged agency action has affected the land areas that the Federation's members use and that the anticipated response by third parties will concern those lands. *Cf. SCRAP*, 412 U.S. at 688-89, 93 S.Ct. at 2416 (holding that more attenuated line of causation and more speculative eventual injury sufficed to survive a motion to dismiss). The members' affidavits make this clear. For example, in his affidavit, one member alleges that the Arizona Strip had been opened to the staking of mining claims, "an action which threatens the aesthetic beauty and wildlife habitat potential of these lands." In addition, the Department explained at oral argument that the Grand Canyon had been opened to nonmetalliferous mining and that the Green Mountain-South Pass areas of Wyoming, originally segregated to protect small streams and adjacent riparian areas and to serve outdoor recreation purposes, has been opened to all forms of mining.

Appellants raise two additional objections that are equally unavailing. First, appellants suggests [*sic*] that the Federation must show that *each* of its members has standing. This assertion is clearly incorrect. In order to establish representational standing, the Federation need only demonstrate that "one or more" of its members would have standing to challenge the Department's actions. *UAW*, 106 S.Ct. at 2529; *see Warth*, 422 U.S. at 511, 95 S.Ct. at 2211. Second, appellants apparently argue that the Federation only has standing to seek relief pertaining to those specific tracts as to which it can demonstrate a concrete interest; that is, appellants appear to contend that the Federation must adduce facts sufficient to establish standing for one (or more) of its members with respect to each specific tract of land at issue. This assertion is not only unsupported by the caselaw, but is also illogical. The Federation is essentially challenging an alleged pattern of agency action embodied in the Department's conduct of its

Program. If the organization can establish that the Department's actions as to one parcel of land are unlawful because the procedure by which the agency terminates classifications and revokes withdrawals fails to comply with FLPMA, then it has established the illegality as to all the lands at issue which have been affected by the unlawful procedure. In such a situation, the Federation need not demonstrate that it is injured by each and every agency action which flows from the implementation of the unlawful Program. See, e.g., *Sierra Club v. Adams*, 578 F.2d 389, 391-93 (D.C.Cir.1978). Concrete particularized injury to any one of its members with regard to any covered land is sufficient.

In sum, we conclude that the Federation has alleged facts that demonstrate that the actions of the Department threaten to harm the cognizable interests of the Federation's members. Consequently, we find that the Federation has alleged injury in fact sufficient to establish standing to pursue its two FLPMA claims against the Department.

In addition to challenging the Federation's standing to prosecute Counts I and VII of its complaint, the Department challenges the district court's holding that Representative Seiberling has standing to pursue his independent claim, which mirrors Count II of Federation's complaint (challenging the Department's failure to seek Presidential or Congressional review of the proposed land status actions). Indeed, the Department goes so far as to suggest that the issue of whether a congressman has standing to protect his right to participate in the legislative process may be appropriate for *en banc* consideration by this court. We decline to reach this issue. The Federation's claims in Count II of its complaint are not relevant to the district court's issuance of the preliminary injunction, which is the issue before us on appeal. The district court grounded its injunction order on the Federation's likeli-

hood of success on the merits of its other two separate FLPMA claims, Counts I and VII of its complaint. Accordingly, the issues of congressional standing in general, and Representative Seiberling's standing in particular, are not before us.

#### B. *Absent Third Parties*

Appellants devote a large portion of their energies to arguing that the injunction impermissibly affects the rights and interests of absent third parties over whom the district court has no personal jurisdiction. Appellants couch their argument in both jurisdictional and due process terms. They contend that the district court lacked jurisdiction to issue a preliminary injunction allegedly affecting the interest of these nonparties. They also contend that the injunction offends principles of due process because it deprives third parties of their property rights without notice and an opportunity to be heard.

Appellants' jurisdictional argument is unsound. The district court has not exercised jurisdiction over any party beyond its lawful reach. The injunction does not compel any absent party to take any action, nor does it prohibit any absent party from acting in any way. As the district court held, "the preliminary injunction enjoins only federal defendants. Third parties are not subject to its prohibitions." Fed. 10th Order at 10. The district court clearly has subject matter jurisdiction to review executive actions for their compliance with a statutory mandate, see 28 U.S.C. §§ 1331, 1346, and it has personal jurisdiction over the federal defendants.

While acknowledging that the district court modified its order so that nonparties are not expressly enjoined, appellants argue that the practical effect of the injunction is the same on these nonparties. They argue that in enjoining

the Department's approval of nonparties' applications for land development interests, the court has in effect enjoined the nonparties from exercising their property rights. We do not agree. The order does not deprive any person or entity who is not before the court of his property rights. The injunction does not invalidate existing mining claims or mineral leases. Indeed, the order explicitly allows holders of existing mining claims to continue to satisfy the legal requirements to preserve those claims. Mountain States complains that such claims and leases may be void *ab initio* if they were initiated before the land was lawfully available for entry. However, the injunction simply *suspends* the classification and withdrawal terminations under the Program; it does not reinstate the original withdrawals and classifications. Thus, the court's order does not upset these interests. Nor does it overturn completed sales or exchanges of previously withdrawn lands. The injunction addresses only the Department's ability to convey legal title to private persons in the future. If title has already vested in third parties, their right to use and enjoyment of that property is not affected by the court's order. Similarly, the injunction does not affect the contractual rights of third parties; these parties remain fully able to make any claim arising under their contracts. The preliminary injunction merely preserves the *status quo* by preventing the staking of new mining claims, the issuance of additional mining leases, and the loss of additional public lands to private interests via sale or exchange.

The injunction's only actual effect on third parties is lost or delayed opportunity to consummate transactions for the purchase or use of federal lands in the future. These interests, however, are not constitutionally protected property rights. The absent third parties to whom appellants refer stand in various stages in the process of perfecting their interests in the lands at issue. Some parties have

staked initial claims, or taken other preliminary steps, but require BLM to take further action before they can complete their development projects. The injunction prohibits the BLM from acting to further these projects during the pendency of this litigation (presuming such action would conflict with the original classification or withdrawal). Thus, some third parties are delayed in obtaining certain interests — e.g., receiving approval to drill oil and gas wells on leases issued prior to the injunction, perfecting final entries, obtaining patents under the land laws — as a result of the injunction. But these absent parties have no contractual or legal right to additional BLM permit or approvals. See, e.g., *Lewis v. Hickel*, 427 F.2d 673, 676-77 (9th Cir.1970), *cert. denied*, 400 U.S. 992, 91 S.Ct. 456, 27 L.Ed. 2d 440 (1971); *Angelina Holly Corp. v. Clark*, 587 F.Supp. 1152, 1156 (D.D.C. 1984). They hold no more than an expectancy, the loss of which does not constitute a deprivation of property within the meaning of the due process clause of the Constitution. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980); *National Consumer Information Center v. Gallegos*, 549 F.2d 822, 828 (D.C.Cir.1977). Their absence from the lawsuit does not preclude the district court from issuing the preliminary injunction. Compare *Ohio ex rel. Brown v. Callaway*, 497 F.2d 1235, 1241 (6th Cir.1974) (holding that contract with construction company rendered inequitable a preliminary injunction restraining the contractors from performing the contractual obligations).

### C. Exhaustion

Mountain States asserts that the Federation failed to exhaust its administrative remedies with regard to land classification terminations. FLPMA itself imposes no ex-

haustion requirement in this context, so Mountain States must look to Departmental regulations. Appellant argues that the Federation could have and should have raised its land use planning and public participation claims through administrative appeals of individual land classification terminations to the Interior Board of Land Appeals (the IBLA). The district court specifically found that the administrative avenues of review touted by Mountain States were not open to the Federation. We agree.

According to the Mountain States, the Federation had recourse to the agency's general procedures for appeals on public land issues. The Department's regulations provide, in relevant part, that

(a) Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management or of an administrative law judge shall have a right to appeal to the [IBLA].

43 C.F.R. § 4.410(a) (1986). Mountain States argues that the district court erred in holding that because the regulations refer only to a "party to a case" as having the right to appeal, the Federation had no access to appellate review. Appellant apparently concedes that the Federation cannot be considered a "party" to any discrete classification termination conducted pursuant to the Program. It asserts, however, that the IBLA construed the rule liberally to vest the right of appeals in "anyone adversely affected" by any Department decision. In support of this proposition, Mountain States cites two cases, *Desert Survivors*, 80 IBLA 111 (1984), and *Park County Resource Council v. Department of Agriculture*, 613 F.Supp. 1182 (D.Wyo.1985), *aff'd*, 817 F.2d 609 (10th Cir.1987).

Neither case relied upon by Mountain States provides authority for an organization that is not a party to the underlying proceeding to appeal from a discrete classifica-

tion termination decision. In *Desert Survivors*, an environmental organization which had actively and extensively participated in the formulation of the land use plans for the lands in question protested approval of a mining plan and then appealed the denial of that protest to the IBLA; unlike the Federation, the organization was a "party to [the] case." The status of the appellant in *Park County Research Council* is less clear. It appears, however, that the organization was involved in an on-going interchange with BLM concerning the issuance of a drilling permit, and when BLM granted the permit, the organization appealed the decision to the IBLA. See 613 F.Supp. at 1184-85. It would appear, therefore, that the organization was also a party to the case as to that issue. Moreover, with regard to the organization's challenge to BLM's decision not to draft an EIS before pursuing its proposed action, the Tenth Circuit reversed the district court's holding that the plaintiff had failed to exhaust its administrative remedies by not appealing to the IBLA. The court specifically found that "[n]either the IBLA nor any other administrative forum was available to plaintiffs at the time of suit." 817 F.2d at 619. Thus, there is no indication in either case that the IBLA interprets its regulation to permit *anyone* adversely affected by a Department decision to appeal. In the absence of such a clear agency interpretation, we are constrained to find that the rule means what it says: only a "party" to a proceeding that culminates in a classification termination decision may appeal that decision to the IBLA. We thus conclude that the Federation had no right to appeal any of the challenged classification terminations pursuant to this regulation. Consequently, the organization cannot be charged with failure to exhaust administrative remedies.

Even if petitioners could have appealed to the Board under § 4.410(a), we do not believe that the district court

erroneously refused to require them to do so. Where, as here, the doctrine of exhaustion of administrative remedies is not mandated by statute or regulation, "its application rests within the sound discretion of the trial court." *Southeast Alaska Conservation Council v. Watson*, 697 F.2d 1305, 1309 (D.C.Cir.1983). Absent such statutory command, exhaustion is a flexible requirement, tailored to "an understanding of its purposes and of the particular administrative scheme involved." *McKart v. United States*, 395 U.S. 185, 193, 89 S.Ct. 1657, 1662, 23 L.Ed.2d 194 (1969). Ordinarily, further administrative review serves to allow the agency to make a factual record, to exercise its discretion, or to apply its expertise. It permits the agency to discover and correct its own errors and prevents the deliberate disregard of administrative processes through premature judicial intervention. *Id.* at 194-95, 89 S.Ct. at 1663.

None of these purposes would be served by requiring additional exhaustion here. Plaintiff has sought to present its objections to the agency by various methods: letters to the Secretary, letters to the BLM director, and numerous discussions with Interior and BLM officials. Agency officials were afforded ample opportunity to reflect on petitioners' contentions, to apply their expertise, and to "correct [any] error if error there be," *Brotherhood of Rail. Trainmen v. Chicago M., St. P. & P.R. Co.*, 380 F.2d 605, 608, cert. denied, 389 U.S. 928, 88 S.Ct. 289, 19 L.Ed.2d 279 (1967). "So long as the appellant \* \* \* has put an objection on the record, the obligation to exhaust is discharged." *Safir v. Kreps*, 551 F.2d 447, 452 (D.C.Cir.1977).

The agency's failure to raise the exhaustion defense, coupled with a continuous course of action demonstrating a commitment to its view of the law, indicated to the district court that further administrative process would be futile. From the agency's silence, the court reasonably sur-

mised that the Department had nothing more to add. Cf. *Asarco Inc. v. EPA*, 578 F.2d 319, 320-21 n. 1 (D.C.Cir.1978) ("The agency's failure to insist upon exhaustion \* \* \* suggests that, in [its] view, the costs \* \* \* do not outweigh the benefits of [the] court's immediate consideration [of the issues on appeal].") In addition, the district court predicted that appellants would not change their mind on key legal questions during the course of any further hearings. The administrators have forged ahead with plans to modify the status of millions of acres of land despite continuous objection by petitioners over several years. Appellants have clearly considered and rejected plaintiffs' view of the statute's requirements for public participation and the timely promulgation of new Plans. Contrary to the dissent's implication, evidence that an agency has made up its mind on the law is relevant to the question of futility. See, e.g., *NRDC v. Train*, 510 F.2d 692, 703 (D.C.Cir. 1975); *Athlone Industries v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485, 1489 (D.C.Cir. 1983); *Committee for GI Rights v. Callaway*, 518 F.2d 466, 474 n. 20 (D.C.Cir. 1975). Therefore, the court did not abuse its discretion by relying on the Department's irreversible commitment to its view of the law.

In concluding that the district court abused its discretion on exhaustion, the dissent assumes that the "factual" inquiry which it deems necessary to establish irreparable injury would be undertaken by the agency in hearings held to satisfy an exhaustion requirement. The prediction that the directed factual inquiry touted by the dissent would be conducted is simply implausible. In any appeal to the Board under 43 C.F.R. § 4.410(a), the focus of plaintiffs' objection would likely be, not the adverse effects of any particular termination decision or its consequences, but the statutory adequacy of the pre-FLPMA plans and the legal authority of the BLM to terminate classifications

under the FLPMA. Since the disposition of plaintiffs' objections before the Board would inevitably turn on the threshold resolution of legal issues on which the Department has made its position clear, the district court's rejection of the exhaustion defense was plainly appropriate.

#### D. Laches

Mountain States also argues that the district court erred in not finding that the Federation's claims are barred by the doctrine of laches. Appellant contends that publication in the *Federal Register* put the Federation on constructive notice of the withdrawal revocations and land classification terminations under the Program and that the organization unreasonably delayed in lodging its objections. Mountain states asserts that during the period between 1981 and the institution of this lawsuit, third parties relied on the apparent regularity of the Department's actions and made significant investments in the affected lands. In Mountain States' view, this detrimental reliance combined with the Federation's delay supports a finding of laches and bars issuance of a preliminary injunction as to the Department's past actions.

Mountain States never raised this issue before the district court. Ordinarily, issues and legal theories not asserted at the district court level will not be heard on appeal. See *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C.Cir.1984). "[O]ur procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact." *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 721, 85 L.Ed. 1037 (1941). We do not believe that this case warrants departure from the normal rule. Laches is

an affirmative defense that requires findings that the plaintiff delayed inexcusably or unreasonably in filing suit and that the delay was prejudicial to the defendant. See *Rozen v. District of Columbia*, 702 F.2d 1202, 1203 (D.C.Cir. 1983). Whether the doctrine of laches bars an action depends upon the particular circumstances of the case. See *Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 843 (D.C.Cir.1982). The analysis is in large part fact-based and, in any event, is primarily addressed to the discretion of the trial court. See *Park County Resource Council*, 817 F.2d at 617 (noting judicially recognized principle that laches must be invoked sparingly in environmental cases); *Concerned About Trident v. Schlesinger*, 400 F.Supp. 454, 478 (D.D.C.1975), *aff'd in part, rev'd in part on other grounds*, 555 F.2d 817 (D.C.Cir. 1977). In such circumstances, it would be especially imprudent for an appellate court to address the issue in the first instance.

Having resolved these preliminary issues, we turn finally to consider the soundness under traditional equity standards of the district court's issuance of the preliminary injunction.

### III. THE PRELIMINARY INJUNCTION

It is well-settled that the direct court must consider four factors in deciding whether a plaintiff is entitled to a preliminary injunction: (1) the plaintiff's likelihood of success on the merits; (2) the threat of irreparable injury to the plaintiff absent the injunction; (3) the possibility of substantial harm to other parties caused by issuance of the injunction; and (4) the public interest. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13, 102 S.Ct. 1798, 1803, 72 L.Ed.2d 91 (1982); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C.Cir.1977). After weighing these

factors, the district court concluded that a preliminary injunction should issue in this case. Appellants challenge the court's determination, asserting that each factor in the traditional preliminary injunction inquiry counsels dissolution of the injunction.

A district court's decision to grant or deny a motion for preliminary injunction is reversible only for abuse of discretion. *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648 (1975); *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 151-52 (D.C.Cir.1985). In making its decision, the district court makes findings of fact, conclusions of law, and determinations about the balancing of the injunction factors. As to each, we owe the district court deference. We are most deferential to the court's balancing of the four injunction factors. *See id.* at 151-52. Questions of fact are reviewed under the clearly erroneous standard. *See Amoco Production Co. v. Village of Gambell, Alaska*, \_\_\_ U.S. \_\_\_, 107 S.Ct. 1396, 1404, 94 L.Ed.2d 542 (1987); *Foundation on Economic Trends*, 756 F.2d at 152. Although we are least deferential on legal issues, "we ordinarily do not consider the merits of the case further than necessary to determine whether that discretion was abused." *National Organization for Women v. SSA*, 736 F.2d 727, 733 (D.C.Cir.1984) (internal quotes and footnote omitted). We should overturn the district court's decision "when it rests its analysis on an erroneous premise or is clearly wrong in reaching its conclusions." *White House Vigil for ERA Committee v. Watt*, 717 F.2d 568, 571 (D.C.Cir. 1983). With these principles in mind, we examine the district court's decision to issue the preliminary injunction.

#### A. *Likelihood of Success on the Merits*

In considering the Federation's likelihood of success on the merits, the district court considered only two of the Federation's claims: first, that the Department's termination of land classifications without first preparing Plans violated FLPMA; second, that the Department failed to provide for public participation in their withdrawal revocation decisions contrary to FLPMA's command. It is undisputed that if the Federation ultimately prevails on these two FLPMA claims, it could obtain the permanent injunction it ultimately seeks. Thus, in light of the district court's conclusion that the Federation will likely succeed on these two counts, it correctly declined to reach the merits of the Federation's other claims. We review then the court's determination as to these two counts. We find that although the merits are close, the court did not rest its analysis on any erroneous premise and was not clearly wrong in the conclusions it reached; we therefore conclude that the court did not abuse its discretion in finding that the Federation is likely to succeed on the merits of these claims.

##### 1. *Failure to review Land Status Actions in the Context of Land Use Planning*

As explained earlier, FLPMA established substantive land management criteria for public land, required the Department to engage in land use planning, and preserved withdrawals and classifications already in effect. Section 202 of the Act, which concerns classifications, directs the Secretary of the Interior to develop and employ "land use plans," which establish the use to which tracts and areas of federal lands may be put. 43 U.S.C. § 1712(a). This obligation applies regardless of whether the land has been

previously classified. *See id.* Subsection (d) further provides:

Any classification of public lands or any land use plan in effect on October 21, 1976, is subject to review in the land use planning process conducted under this section, and all public lands, regardless of classification, are subject to inclusion in any land use plan developed pursuant to this section. The Secretary may modify or terminate any such classification consistent with such land use plan.

43 U.S.C. § 1712(d). Department regulations identify the land use plans developed pursuant to FLPMA as Plans. *See* 43 C.F.R. § 1610.0-5(1). It is undisputed that the Department had completed only a miniscule number of Plans for the land covered by pre-1981 classifications during its implementation of the Program. The Department instead relied on Management Framework Plans (MFPs), developed before FLPMA's enactment under the C & MU Act in terminating the disputed land retention classifications under the Program.

The district court found that the Department's reliance on MFPs did not satisfy the statutory expectations of "land use plans." The court found that MFPs "are not identical substitutes" to Plans. Dec. 4th Order at 16. The court acknowledged that Congress anticipated that the agency would have to rely on MFPs for a certain period, until Plans were developed for all tracts of federal lands, but the court concluded that Congress only approved temporary reliance on MFPs, and that nine years was excessive. The court thus concluded that the Federation was substantially likely to succeed in establishing that the Department had violated FLPMA by terminating the classifications on 160 million acres of land without following the statute's criteria for land use plans.

Appellants argues that MFPs have been and continue to be legally adequate land use plans under FLPMA and therefore the Department reasonably relied on them in the terminations at issue. In support of this proposition, appellants cite language in the legislative history of FLPMA that indicates that Congress was aware of BLM's pre-FLPMA land use planning systems and "found them to be consistent in general principles and practices with the objectives of [the new legislation]." H.R.Rep. No. 1163, 94th Cong., 2d Sess. 5 (1976), U.S. Code Cong. & Admin. News 1976, pp. 6175, 6179. Appellants argue that this language coupled with a reference in section 302(a) to the use of land use plans prepared under section 202 "when they are available," 43 U.S.C. § 1732(a), indicates that Congress sanctioned the agency's termination of classifications without having prepared Plans. Finally, the Department argues that the district court's holding is controlled by *National Resources Defense Council, Inc. v. Hodel (NRDC)*, 624 F.Supp. 1045 (D.Nev.1985), *aff'd*, 819 F.2d 927 (9th Cir.1987). None of appellants' arguments persuades us that the district court was clearly wrong in reaching its conclusion.

A fair reading of the statute and the Department regulations convinces us that Plans and MFPs are not equally adequate to meet FLPMA's requirements with regard to establishment of land use plans. It is true that nothing in the Act or the legislative history distinguishes between MFPs and Plans. But the agency itself has identified the Plans as the land use plans mandated by the Act. Departmental regulations describe what the Plans are designed to generally establish and how they conform with the criteria for development and revision of land use plans stipulated by section 202 of FLPMA. The regulations then rehearse lengthy provisions regarding the procedures for development of Plans in order to comply with FLPMA require-

ments. *See* 43 C.F.R. Subpart 1610. The regulations also provide for the use of MFPs during a "transition period" until they are superseded by Plans. *See id.* at § 1610.8. The Department contends that the regulations permit reliance on MFPs under this section only if they conform to the prescribed planning standards of section 202 of FLPMA. But the regulations themselves belie this contention. There is nothing in the regulations that necessitates or directs such conformity. The regulations provide that the Department may rely on MFPs only if they comply with "the principle of multiple use and sustained yield and shall have been developed with public participation and governmental coordination." *Id.* § 1610.8(a)(1). These factors do not bring the MFPs into conformity with section 202; section 202 requires considerably more of the Department in establishing land use plans under FLPMA. These requirements include "use [of] a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences, . . . giv[ing] priority to the designation and protection of areas of critical environmental concern, . . . [and] weigh[ing] long-term benefits to the public against short-term benefits." 43 U.S.C. § 1712(c). Management decisions reached under MFP's limited criteria may be very different from those reached under Plans' criteria. Mountain States' contention that FLPMA works no change to the way in which BLM was to conduct land use planning is contradicted not only by the comprehensive statutory system but also by the Department's own regulations, which contemplate and instruct the development of entirely new land use plans to comply with FLPMA and to be called Plans. Although BLM's pre-FLPMA management system, as expressed in MFPs, may have conformed to the "general principles" of FLPMA, Congress did not approve the extended use of

existing plans in place of the plans mandated for development under FLPMA.

The Department's contention that Congress authorized BLM to proceed with management of the public lands using existing MFPs does not support its action. The Department relies on FLPMA's provision that

The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available.

43 U.S.C. § 1732. This section evinces Congress' recognition that Plans would not be ready immediately and arguably speaks to Congress' intention that the Department's hands not be tied pending completion of the Plans. But this section cannot be read to override the specific language of section 202(d), the sole provision of the Act regarding modification of land use classifications, which provides that existing classifications may be modified or terminated only pursuant to FLPMA—developed land use plans. Moreover, the two provisions are not necessarily incompatible. There are presumably many management decisions embracing multiple use and sustained yield principles that do not necessitate terminating existing classifications; most C & MU classifications dedicated lands to multiple uses. Thus, the Act may reasonably be understood as permitting the Department to continue relying on existing MFPs with regard to those management decisions not involving termination of classifications. In any event, in light of section 202(d)'s plain language, we cannot find that the district court was clearly wrong in concluding that Congress did not sanction the termination of classifications covering the vast majority of federal lands outside the context of FLPMA land use plans.

Finally, *NRDC v. Hodel, supra*, does not contradict the district court's determination. The Department contends that the Ninth Circuit implicitly held that MFPs established by regulations and used by BLM for over ten years are valid under FLPMA. Actually, the holding of the case is not nearly so broad. In *NRDC*, environmental groups challenged certain livestock grazing decisions made by the BLM. The issue for the court's review was the adequacy of a specific MFP covering grazing in the Reno, Nevada area. The Ninth Circuit characterized the plaintiffs' complaint as "a challenge to the BLM's policy decision to postpone livestock grazing adjustment until reliable data was available." *NRDC*, at 930. The court held simply that the BLM's method of providing for grazing under the MFP did not violate FLPMA. *See id.* at 930. The adequacy under FLPMA of a single, specific MFP with regard to one planning decision has no relation to the lawfulness of the overall pattern and practice of the Department in ignoring FLPMA's land use planning requirements in terminating protective classifications under the Program. Contrary to the Department's assertion, *NRDC* does not stand for the proposition that MFPs are interchangeable with Plans for purposes of developing satisfactory land use plans under the Act.

It may be that when the district court proceeds to consider the merits of the claims on final review (or on summary judgment), it will conclude that the MFPs conform with the section 202 FLPMA land use planning criteria. However, the most reasonable inference drawn from the statute and from the Department's own regulations is that MFPs were not designed to and do not comply with FLPMA. Thus, we cannot find that the district court abused its discretion in concluding that the Federation is likely to succeed in providing that the Department violated

FLPMA in terminating classifications without first having developed Plans for the covered land.

**2. *Failure to Provide for Public Participation in Connection With the Revocation of Land Withdrawals***

FLPMA contains numerous provisions for public participation in the Department's decision-making. FLPMA states broadly that

The Secretary shall allow an opportunity for public involvement and by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands.

*Id.* § 1712(f). More particularly, section 309(e) of FLPMA directs the Secretary to provide for public participation in "the preparation and execution of plans and programs for, and the management of, the public lands." 43 U.S.C. § 1739(e) (emphasis added). The district court found that withdrawal revocations fall into the "management" category of section 309(e). Since the Department did not permit public input for its decisions to revoke land withdrawals under the Program, the court concluded that the Federation is likely to succeed on its claim that the Department violated section 309(e) of the Act. We can locate no evidence that this determination was incorrect.

Appellants proffer several arguments in opposition to the district court's conclusion, all of which are impotent. First, appellants contend that the statutory language of section 309(e) does not extend to the Secretary's withdrawal revocation authority under section 204 of FLPMA. In support of this interpretation, they call upon the Act's

legislative history. But, in fact, the legislative history does not speak to the issue, although there are strong indications that Congress intended some form of public input for all decisions that may have significant impact on federal lands. *See, e.g.*, H.R. Rep. No. 1163, 94th Cong., 2d Sess. 7 (1976), U.S. Code Cong. & Admin. News 1976, p. 6181. The Department also argues that the district court's reading renders section 204(h) superfluous. Section 204(h) provides that the Department may promulgate new withdrawals only after it has afforded an opportunity for a public hearing. *See* 43 U.S.C. § 1714(h). Contrary to the Department's position, there is nothing incongruous between this provision and the court's reading of section 309(e). The fact that Congress specifically mandated that a "hearing" precede new withdrawals does not mean that it did not contemplate some form of public participation, short of a public hearing, in connection with withdrawal revocations.

In a related argument, appellants contend that Congress intended public participation only in the context of the land use planning process, as opposed to individual BLM revocation decisions. This interpretation of section 309(e), however, reads "the management of public lands" language out of the statute. The section already provides for public input into "the preparation and execution of plans and programs for . . . the public lands." 43 U.S.C. § 1739(e). Such a negation of Congress' explicit language offends well-settled principles of statutory interpretation. *See, e.g., American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 513, 107 S.Ct. 2478, 2492, 69 L.Ed.2d 185 (1981).

The Department contends that it satisfies section 309(e)'s requirement for public participation by providing for public participation in the development of the land use plans and in specific disposal decisions made after the

revocation, such as the decision whether to issue a lease or whether to conduct a sale or exchange. The appellants' contention that section 309(e)'s public participation requirement is satisfied by further provision for public input into particular disposal decisions fails to answer the specific requirements of the statute: withdrawal revocations are themselves major management decisions. Permitting the change in status of land from retention (even if for limited purposes) to disposal (even if for limited purposes) raises issues and concerns that are not the same as those that might arise when deciding how or to whom to dispose the land. Evaluating the repercussions of opening millions of acres to potential development entails different and graver considerations than judgments concerning the local impact and advisability of uses for particular parcels. The patchwork of provision for public comment on specific disposals cannot adequately substitute for public input into this important aspect of comprehensive planning. In addition, the discretionary nature of these public participation requirements dictates that many individual land disposal decisions will never be subject to meaningful public scrutiny.

In effect, the Department's practices have insulated large-scale withdrawal revocation programs such as these from public oversight, since the public has never been directly involved in formulating a systematic approach to withdrawal revocations. This total absence of public input into sweeping policy decisions affecting vast tracts of public land effectively frustrates the public participation requirement. For this reason, we cannot find that the district court was clearly wrong in deciding that section 309(e) of FLPMA contemplates some form of public participation in the Department's decision to revoke withdrawals on federal lands. We therefore conclude that the court did not abuse its discretion in concluding that the

Federation is likely to succeed on its claim that the Department violated FLPMA in revoking withdrawals under the Program without affording opportunity for public input.

#### B. Irreparable Injury

The district court has “no problem in holding that [the Department’s] actions in lifting protective land restrictions will irreparably injure [the Federation’s] members unless enjoined, . . . [because the Department has] removed the only absolute shield against private exploitation of these federal lands.” Dec. 4th Order at 18. The court explained that although classification terminations and withdrawal revocations do not immediately open the lands to exploitation, the agency’s actions leave no prohibitions on development in place: statutes and regulations can only regulate its process. The court stressed that any mining or leasing could cause irreparable injury by permanently destroying wildlife habitat, air and water quality, natural beauty, and other environmental and aesthetic values and interests. Moreover, sales, leases, and procedures whereby mining interests can gain exclusive use of the land would permanently remove the land from the public domain and enjoyment. In conclusion, the court stated that “[w]ithout the preliminary injunction, [the Department’s] termination of classifications and withdrawals could lead to the permanent loss of lands to public use and enjoyment – an injury we feel would be irreparable,” *Id.* at 19.

To the extent we can decipher appellants’ objections to the district court’s determination, we are not convinced that they should lead us to reverse the court’s finding of irreparable injury as clearly erroneous. The Department begins its challenge by asserting, without elucidation, that the district court ignored the teaching of the Supreme Court in *Weinberger v. Romero-Barcelo*, 456 U.S. 305,

102 S.Ct. 1798, 72 L.Ed.2d 91 (1982), and *Amoco Production Co. v. Village of Gambell, Alaska*, \_\_\_ U.S. \_\_\_, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987). The Department’s invocation of these cases is baffling. In both cases the Supreme Court reviewed a lower court’s holding that a specific statute prohibits courts faced with an alleged violation from relying on remedies other than an immediate prohibitory injunction. *See Gambell*, 107 S.Ct. at 1398 n. 1 (Alaska National Interest Lands Conservation Act); *Romero-Barcelo*, 456 U.S. at 306-07, 102 S.Ct. at 1800 (Federal Water Pollution Control Act). In both cases, the Court concluded that in drafting the statute at issue, Congress did not intend to deny courts their traditional equitable discretion. *See Gambell*, 107 S.Ct. at 1403; *Romero-Barcelo*, 456 U.S. at 320, 102 S.Ct. at 1807. Accordingly, the Court directed the courts to engage in the traditional injunction inquiry, which is just the inquiry the district court conducted in this case. Unlike the lower courts in *Gambell* and *Romero-Barcelo*, the court did not *presume* irreparable injury; it examined the Federation’s allegations and showings and determined that its members would be irreparably harmed absent the preliminary injunction. *Compare Gambell*, 107 S.Ct. at 1402. Thus, contrary to the Department’s assertion, the district court followed the teaching of the Supreme Court in these two cases.

We reject appellants’ suggestion that the district court was constrained to require the Federation to proffer specific evidence as to each tract of land, detailing just how the Department’s further action pursuant to its Program would cause its members irreparable harm. The district court’s determination about “‘what evidence can properly be adduced in the limited time that can be devoted to a preliminary injunction hearing’” is entitled to substantial deference. *Foundation on Economic Trends*,

756 F.2d at 151 (quoting *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 835 n. 32 (D.C.Cir.1984)). Given the breadth of the agency's action, the enormity of the land affected, the duration of the Program, and the preliminary nature of the proceeding, we cannot fault the court for not having further particularized its findings.

The record before the district court was complete enough to allow it to decide that any further action by the Department would irreparably harm the Federation's members' interests. The Federation alleged that absent preliminary relief its members would suffer irreparable damage because irreparable damage will be done to tracts of public land they use. The Federation has delineated specific ways in which, in the absence of the injunction, its members' interests in conserving natural resources for their aesthetic, recreational, and environmental use and enjoyment will be irreparably injured. In most instances, the original purpose of a withdrawal was to ensure that the lands so designated be retained in federal ownership and thereby serve public rather than private purposes; in the absence of such retention, the Department may take action, such as sales and exchanges, which would result in permanent loss of those lands to public access and enjoyment. Mountain States estimates the number of land exchanges and sales that have been completed or are currently being planned and negotiated to be in the thousands. In addition, in the absence of injunction, the Department is at liberty to grant rights of way, leases, permits, and easements, which may themselves substantially impair resource values. Pursuant to the Program, 13 million acres have been opened to mining. Under federal mining laws, anyone can enter open public lands, undertake excavation, stake mining claims, and set up mining operations. See 30 U.S.C. §§ 22, 23, 27, 35 (1982); see also 43 C.F.R.

§ 3809.0-6 (1986). Mining operations in turn have substantial adverse effects on scenery, wildlife, recreation, and other environmental values. Further, lands opened to mining may be permanently lost to the public under mining laws because mining claimants enjoy enforceable rights to exploit the minerals that they find and may proceed to gain title in fee simple. See *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 98 S.Ct. 2002, 56 L.Ed.2d 570 (1978). Finally, about 8 million acres have been opened to mineral leasing and 4.4 million acres have been opened to oil and gas leasing. The Leasing Act does not limit the Department's leasing authority, see 30 U.S.C. § 226(b), and pre-exploration and exploration activities often can begin soon after leases are awarded. These activities can cause immediate and direct physical damage to public lands. See, e.g., BLM, *North Fork Well Final Environmental Impact Statement* (May 9, 1985) at 60-61 (detailing unavoidable impacts associated with exploratory drill site, including big game habitat displacement, loss of visual resources, and loss of recreation setting). Mountain States asserts that 7,000 mining claims have been located and 1,000 mineral leases have been issued on lands that were previously closed to mining or mineral leasing.

Appellants do not, nor could they reasonably, argue that the injuries the Federation and the district court envisioned would not be irreparable. Mountain States, however, challenges the Federation's showing on other grounds, all of which we reject. At times, Mountain States maintains that the Federation must demonstrate as a matter of fact that its members have already suffered irreparable injury from the Department's actions. This contention is absurd. A preliminary injunction is designed to *prevent* irreparable injury; its value would be totally eviscerated if the plaintiff had to show that the harm had

already occurred before the court could issue the injunction.

At other times, Mountain States concedes that a showing that plaintiff *will* suffer irreparable injury is sufficient, but contends that such a showing cannot be made here because the potential irreparable harms are too remote: with the exception of locating mining claims, all other forms of entry are dependent on the Secretary's exercising his discretion to permit entry. In this regard, Mountain States appears to misunderstand the purpose of the preliminary injunction; it is designed precisely to prevent the Secretary from exercising his discretion in circumstances in which it likely would lead to irreparable injury. Furthermore, the harm is not so remote as appellant suggests. Mountain States' own position that the injunction impermissibly affects the interests of absent third parties demonstrates with ample illustrative examples that these parties are chomping at the bit to develop the interests in the federal lands under the Program. Appellant made clear that but for the injunction, the Secretary would be exercising his discretion to permit entry to many third parties. And the imminent actions, which include transfers, sales, and mineral and mining developments, would trigger the very irreparable harms the Federation has alleged.

Finally, Mountain States contends that the Federation has failed to demonstrate an adequate connection between its individual members and the threatened harm. Appellants' argument mirrors its standing claim and suffers from the same infirmity. As noted earlier, the affidavits supplied by the Federation specifically identify locations where its members' interests are threatened by the Department's actions in lifting restrictions on mining and other forms of natural resource exploitation. Indeed, according to the Department, mineral claims have already been staked in an area in which one member uses and enjoys the resources.

At bottom, appellants' argument is that the district court's preliminary injunction is overbroad. Appellants observe that only about 14% of the total acres subject to the injunction have been opened to mining or some form of natural resource leasing, and claims have been issued on only a small portion of those lands. Appellants argue that the injunction for the most part enjoins activity that poses no threat to the Federation's members' interests. The Federation has admitted that its priority is contesting the opening of the land to mineral exploration and mining, but these activities are not the only threats to the members' interests. The Federation is also concerned about public lands being opened to settlement, agricultural uses, sales, and exchanges. Such disposals, especially sales and exchanges, can deprive the members of the use and enjoyment of the lands' resources altogether. Pursuant to the classification terminations, millions of acres have been opened to such uses. The evidence reveals that there have already been more than 260 agricultural entries, more than 430 proposed sales, and some 60 proposed land exchanges. The evidence of overbreadth is therefore far less compelling than appellants would have us believe.

There may be instances in which a proposed land use or disposal would not cause irreparable harm to the Federation's members' interests. But this does not necessitate the dissolution of the preliminary injunction. The district court retains the power to modify the injunction in the exercise of its sound discretion. In fact, the district court has implemented a procedure whereby specific tracts of land may be exempted from the preliminary injunction upon a proper showing. In our view, this procedure adequately protects the rights of third parties and the Department from any potential overbreadth in the injunction order.

### C. Possibility of Harm to Other Parties

When considering a motion for preliminary injunction, the court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Gambell*, 107 S.Ct. at 1402; *see also Romero-Barcelo*, 456 U.S. at 312, 102 S.Ct. at 1803. In deciding to issue the preliminary injunction, the district court acknowledged that the injunction would harm third parties by barring holders of claims and leases from developing their interests and by delaying the investment return of those who have made investments to obtain access to or use of the lands covered by the injunction. The court noted, however, that the injunction itself would not sever these parties' interests, but only delay their realization. In light of this assessment, the court concluded that the injury to third parties was not "so serious as to outweigh the other factors supporting the injunction." Dec. 4th Order at 19.

In arguing that the district court's balancing of the competing interests was defective, appellants simply reiterate their prior arguments: the threat of irreparable harm to the Federation's members absent the injunction is remote, speculative, and slight, whereas the harm to third parties as a result of the injunction is immediate and palpable. We have already addressed appellants' attempts to belittle the threat of irreparable harm; their attempts to inflate the injury to third parties is equally hollow. The court was careful to craft the injunction so that third parties' interests would be adversely affected as little as possible. The injunction does not invalidate existing mining claims or mineral leases, nor does it overturn completed sales or exchanges. The post-1981 revocations and terminations are "suspended," not voided; therefore, the mining leases and claims issued during that time are not invalidated. The

possible harm to third parties is delay, a cloud on title (which would have been caused to some degree by the litigation itself, even absent the preliminary injunction), and investment costs. The district court reasonably held that the permanent loss of aesthetic values and environmental resources, not to mention access to the land itself, outweighed the possible injury to third parties due to the preliminary injunction.

### D. The Interest of the Public

The district court held that "the public interest clearly favors granting the preliminary injunction." Dec. 4th Order at 20. This conclusion relied predominantly on FLPMA's policy statement announcing the importance of ensuring orderly procedures for removing certain federal controls over government-owned lands. *See* 43 U.S.C. 1701(a)(1). The court reasoned that if the agency had violated FLPMA's procedures, the injunction would protect against further illegal action pending resolution of the merits. In addition, the court held that the injunction would serve the public interest in protecting the environment from any threat of permanent damage. The court concluded that although the preliminary injunction would inconvenience the Department and those parties holding interests acquired under the Program, the public interest favored issuance of the injunction, since "denying the motion could ruin some of the country's great environmental resources—and not just for now but for generations to come." Dec. 4th Order at 21.

Mountain States argues that the district court failed to weigh all of the applicable public interest considerations set out in FLPMA's policy statements, particularly the Act's directive that all BLM lands be managed to provide for multiple use and sustained yield, with some emphasis

on the importance of developing natural resources. See 43 U.S.C. §§ 1701(a)(7), (12). Introduction of Mountain States' "missing" considerations, however, does not change the balance of interests. The interests that Mountain States claims are missing are accounted for by FLPMA itself, and it is FLPMA which guided the court's determination that the public interest favors the granting of the preliminary injunction. FLPMA created a scheme whereby BLM's management of public lands would be subject to specified procedures that mandate consideration of numerous factors. Thus if BLM is violating those procedures, its revocations and terminations may not represent the proper balance of competing uses of public land. Contrary to Mountain States' suggestion, the district court is not proclaiming that mining and mineral exploration is always bad or that retention of pristine public lands is necessarily good. Nor does the court's order prevent multiple use of the affected lands. The injunction simply preserves the multiple uses structured before the Department started reordering the scheme. We cannot find that the district court abused its discretion in this regard.

#### CONCLUSION

This is a serious case with serious implications. The Department has reordered the balance of public versus private interests with respect to 180 million acres of federal land. Prompted by the Federation's charges that the Department's land status changes violate the agency's organic statute, the district court has stopped the Department midstream. Not surprisingly, the Department and private parties with an interest in preserving and furthering the Department's actions have mounted attacks on every front in order to defeat the Federation's advance at this preliminary stage of the battle. Some of their jabs are not without

force. Nevertheless, we conclude, for the reasons stated above, that the district court acted well within its sound discretion, and we therefore sustain the preliminary injunction issued by the court. The district court's order is *Affirmed*.

WILLIAMS, Circuit Judge, concurring and dissenting:

The majority today upholds a district judge's self-appointment as *de facto* Secretary of the Interior over 180 million acres—nearly one-fourth of all federal lands and more than half of the public lands managed by the Bureau of Land Management ("BLM"). It does so without a showing that the BLM breached any legal requirement as to a single parcel of land. Even assuming such a breach, the record is barren of any hint that it was material or likely to harm plaintiffs' interests—much less irreparably. Unable to sanction such a judicial usurpation of power, I dissent.

Part I addresses various procedural problems, Part II the merits of the preliminary injunction.

#### I. PROCEDURAL MATTERS

##### A. *Standing*

At this point in the proceeding the issue of standing is largely academic. The district court found that Congressman Seiberling had standing and did not consider that of the National Wildlife Federation ("NWF"). It marched on with the injunction proceedings that resulted in this appeal. During this process, a record developed that supplemented the vague allegations appearing NWF's complaint. By the time the case was submitted to this court, the defendants appear to have conceded the bare minimum necessary for standing.

I write separately on this issue in the hopes of clarifying what a plaintiff must show to meet the injury-in-fact com-

ponent of standing when it seeks a preliminary injunction. The gaps that lingered for some time in this record appear to have been quite unnecessary.

NWF challenges the legality of two programs—classification terminations and withdrawal revocations—that together affect over 180 million acres of public lands. To bring this challenge NWF must show that each program has impaired, or seriously threatened to impair, its members' use and enjoyment of either the subject lands or neighboring ones. This requires that NWF (1) identify lands that are affected by each program; (2) demonstrate that third parties are likely to respond to the regulatory changes with development activities; and (3) identify activities of members in specific areas that would suffer an adverse impact from such third-party conduct. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 733, 92 S.Ct. 1361, 1365, 31 L.Ed.2d 636 (1972); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973); *Wilderness Society v. Griles*, 824 F.2d 4, 10-12 (D.C.Cir.1987).

The specificity required on each of these points is of course a function of the posture of the case. *SCRAP*, 412 U.S. at 689-90 & n. 15, 93 S.Ct. at 2417 n. 15; *Wilderness Society*, 824 F.2d at 16. In *Wilderness Society*, we explained that "while a motion to dismiss may be decided on the pleadings alone, construed liberally in favor of the plaintiff, a motion for summary judgment by definition entails an opportunity for a supplementation of the record, and accordingly a greater showing is demanded of the plaintiff." *Id.* We also noted that plaintiff's opportunity for discovery in resisting summary judgment supported insistence on greater specificity at that stage. *Id.* at 16 n. 10.

Both *Wilderness Society* factors—opportunities to supplement the record and to engage in discovery—will normally be present where plaintiff seeks a preliminary injunction.<sup>1</sup> Moreover, plaintiff in this context must carry its affirmative burden of showing a likelihood of success on the merits; this necessarily includes a likelihood of the court's *reaching* the merits, which in turn depends on a likelihood that plaintiff has standing. It follows that the specificity required for standing allegations to secure a preliminary injunction will normally be no less than that required on a motion for summary judgment.

It is true that *SCRAP* involved motions to dismiss and for a preliminary injunction, *see* 412 U.S. at 689 n. 15, 93 S.Ct. at 2417 n. 15, and that the Court's standing analysis did not distinguish between the two, *see id.* at 683-90, 93 S.Ct. at 2413-17. However, as the Court concluded that the district court completely lacked jurisdiction to issue an injunction, *id.* at 690, 93 S.Ct. at 2417, that silence is of little moment.

The Court's later decisions are at least congruent with the view that a preliminary injunction requires a more powerful showing. In *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974), for example, the Court first found that a complaint against certain judicial officers alleging discrimination in criminal law enforcement and seeking injunctive relief failed to allege a case or controversy because of the speculative character of the injury foreseen. *Id.* at 493-99, 94 S.Ct. at 675-77. It then observed that the same considerations "obviously shade into those determining whether the complaint states a sound basis for equitable relief," *id.* at 499, 94 S.Ct. at

<sup>1</sup> But *see infra*, for discussion of *Palmer v. City of Chicago*, 755 F.2d 560 (7th Cir.1985), and the problem of special exigencies limiting those opportunities.

677, and analyzed the complaint under traditional equitable principles—irreparable injury and adequacy of the remedy at law. *See also Allen v. Wright*, 468 U.S. 737, 760-61, 104 S.Ct. 3315, 3329, 82 L.Ed.2d 556 (1984); *City of Los Angeles v. Lyons*, 461 U.S. 95, 103, 103 S.Ct. 1660, 1665-66, 75 L.Ed.2d 675 (1983).

The exact degree of specificity required of a plaintiff depends, to be sure, on the nature of its claim and the exigencies of the situation. Thus, where a preliminary injunction was needed simply to *preserve* files claimed by plaintiffs to substantiate their claims, the court imposed only a modest burden on them. *Palmer v. City of Chicago*, 755 F.2d 560, 573 (7th Cir.1985). *See Wilderness Society*, 824 F.2d at 16-17 & n. 10 (on motion for dismissal for want of jurisdiction, Fed.R.Civ.P. 12(b)(1), or motion for summary judgment, court must give plaintiff chance to discover evidence relevant to jurisdiction). And of course if facts relating to standing are put in issue, the court must address those conflicts. *See SCRAP*, 412 U.S. at 689, 93 S.Ct. at 2416 (“the allegations must be true and capable of proof at trial”); *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975) (“it is within the trial court’s power . . . to require the plaintiff to supply . . . further particularized allegations of fact deemed supportive of plaintiff’s standing”). Here, NWF has direct access to the evidence necessary to flesh out its claim of standing. Thus it is appropriate for the court to insist on allegations indicating specifically that defendant’s acts are likely to lead to third-party conduct, in specific places, such as to injure plaintiff’s members in their use of specific lands.

NWF’s submissions were adequate on the identity of the lands affected by the regulatory status changes. Its complaint cites the passages in the Federal Register that affected [*sic*] the challenged classification terminations and

withdrawal revocations; these passages identified the lands by legal descriptions. Complaint, Joint Appendix (“J.A.”) at 15-16; Exhibit A, J.A. at 30-47 (citing notice given in Federal Register of each such act). *Compare Wilderness Society*, 824 F.2d at 12 (plaintiffs’ claim of standing fails because affected lands not identified).

As to the other elements, NWF’s submissions were markedly defective. Its complaint alleges that “[m]embers of NWF use and enjoy the environmental resources that will be adversely affected by the challenged actions.” Complaint, J.A. at 15. This is too vague. The defect is similar to that in *Wilderness Society*, though not identical. There plaintiffs alleged use of federal lands throughout Alaska, and claimed impairment through transfer of federal lands to the state. We responded that the lands affected by the challenged policy might not overlap with those used by plaintiffs, 824 F.2d at 15, and said that the “absence of specificity regarding location dooms plaintiffs’ claim of threatened injury.” *Id.* Obviously the requirement of specificity cannot be met by plaintiffs’ simply using broadened allegations (asserting use of “the environmental resources” rather than “various” lands, as in *Wilderness Society*).

After the injunction issued, NWF attempted to “further particularize[ ]” its allegations by submitting the affidavits of two of its members. *Cf. Warth v. Seldin*, 422 U.S. at 501, 95 S.Ct. at 2206. The affidavits themselves are still too vague. They merely state that the affiant uses “the federal lands, including those in the vicinity of [the South Pass-Green Mountain area of Wyoming (for one affiant), and the Grand Canyon National Park, the Arizona Strip (Kanab Plateau), and the Kaibab National Forest (for the other affiant)] for recreational purposes and for aesthetic enjoyment.” J.A. at 372, 376. While a court conceivably could match the legal descriptions in the Federal

Register with these broad stretches of land, it has neither the legal obligation nor the resources to do so.

Further, NWF's complaint alleges, again in the most general terms, that private parties will avail themselves of the withdrawal revocations and classification terminations to develop the lands in a manner incompatible with its members' uses. The affidavits are only slightly more specific, alleging that the lands used by the affiant (or lands in their vicinity) have been "opened to the staking of mining claims," J.A. at 373, 377, or to oil and gas leasing, J.A. at 373. They do not trace the opening of the lands to either of the two challenged programs, do not assert (much less substantiate) that the "opening" was likely to lead to mining or oil or gas development, and do not specify how such activity would interfere with their uses.

The record, however, provides modest support for the inference that some types of the disputed regulatory status changes have a material likelihood of leading to development activity potentially injurious to the activities of plaintiff's members on the lands named in the affidavits. BLM data show that withdrawal revocations have opened over 12 million acres to mining, and classification terminations over 800,000 acres. These resulted in the filing of about 7,000 claims and the filing of plans for operations with respect to 540 acres. See J.A. at 64-70, 94-96. 540 acres worth of activity is not much, out of 180,000,000 acres, but, bearing in mind that *threatened* environmental damage is also a ground of standing, it seems minimally sufficient. Combined with the concession at oral argument that some of the acreage opened to mining was in the vicinity of lands used by one of plaintiff's members in Arizona,<sup>2</sup> this seems to me to minimally meet the standing requirement.

<sup>2</sup> Counsel for Mountain States acknowledged status changes relating to lands described by the Wyoming NWF member, but stated that these merely opened to mining claims areas not containing min-

## B. Exhaustion

In a motion to reconsider the district court's order granting a preliminary injunction, Mountain States Legal Foundation, a public interest law firm that intervened on the side of the defendants, raised the question of whether plaintiff exhausted available remedies as to the classification terminations. It raised no such claim as to the withdrawal revocations, without explanation. The government defendants make no exhaustion claim at all. The district court rejected the defense. I believe this was an abuse of discretion.

First, the silence of the government defendants might be deemed a waiver. But that appears consistent neither with the principles of exhaustion nor with circuit law. The exhaustion requirement serves not only interests of agency autonomy but also interests of the courts:

Exhaustion generally is required as a matter of preventing premature interference with agency processes, so that [1] the agency may function efficiently and [2] so that it may have an opportunity [a] to correct its own errors, [b] to afford the parties and the courts the benefits of its experience and expertise, and [c] to compile a record which is adequate for judicial review.

*Weinberger v. Salafi*, 422 U.S. 749, 765, 95 S.Ct. 2457, 2467, 45 L.Ed.2d 522 (1975). The considerations in the second group plainly bear on important concerns of judicial economy. Government neglect cannot force courts to disregard those concerns.

erals of more than nominal value. See p. 334 *infra* for discussion of classification terminations based on lack of mineral interest. For such areas, the likelihood of private development activity seems too remote to meet the *Wilderness Society* standard.

Indeed, this court has not regarded an agency's failure to invoke the exhaustion defense as a binding waiver. In *Asarco, Inc. v. EPA*, 578 F.2d 319, 320-21 n. 1 (D.C.Cir. 1978), one petitioner raised an argument that another claim had not been made in the administrative proceedings. The court said that indeed the argument had been made, but set out alternative grounds for treating the merits. First, it read the EPA's silence on the issue as evidence that EPA saw no harm to its institutional interests:

First, EPA itself did not move for dismissal on grounds of exhaustion or join in intervenors' motion. The agency's failure to insist upon exhaustion in this particular case suggests that, in EPA's view, the costs—in terms of interfering with agency proceedings, creating an incentive to ignore agency processes in the future, and depriving the agency of a greater opportunity to apply its expertise or of a chance to “correct its own errors”—do not outweigh the benefits of this court's immediate consideration of Sierra's petition. See K. Davis, *Administrative Law of the Seventies* § 20.00 (1977 Sup.); cf. *Weinberger v. Salfi*, 422 U.S. 749, 764-67, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975).

*Id.* The court then invoked two additional factors in support of dispensing with the requirement: first, the issues were purely ones of law, not requiring “a record of fact-finding developed by an agency with special expertise”; second, as other parties had raised “essentially the same question,” it was appropriate to consider both at the same time. *Id.* Obviously the court regarded agency silence as something to be considered, but not a dispositive factor. Cf. *Granberry v. Greer*, — U.S. —, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987) (in habeas action by state prisoner, state's failure to raise exhaustion defense in federal district

court does not bar court of appeals from dismissing for want of exhaustion; but failure to exhaust is not jurisdictional).

Given the discretionary character of the exhaustion defense, this court may only reverse if it finds that the district court's disposition of the issue was an abuse of discretion. *Hayes v. Secretary of Defense*, 515 F.2d 668, 674-75 (D.C.Cir.1975); *Industrial Workers of the World v. Clark*, 385 F.2d 687, 692 (D.C.Cir.1967), *cert. denied*, 390 U.S. 948, 88 S.Ct. 1036, 19 L.Ed.2d 1138 (1968); *Southeast Alaska Conservation Council v. Watson*, 697 F.2d 1305, 1309 (9th Cir.1983).

In rejecting the exhaustion defense, the district court characterized the issues in this case as purely “legal.” J.A. at 169. As my substantive analysis should make clear, that characterization simply neglects the core issue in the case: whether the land use plans used by the BLM in terminating classifications failed in any material way to live up to the standards imposed by the Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. § 1701 *et seq.* (1982). Had plaintiff sought review in the Board of Land Appeals, the Board would have compared the land use plans actually relied upon by the BLM (discussed below at pp. 19-20), and evaluated them for compliance with FLPMA § 202(d), 43 U.S.C. § 1712(d), the provision here alleged to have been violated. If it found any deficiencies in the plans, it would presumably have considered whether correction of any of those deficiencies would have any prospect of affecting the planning outcome; in so doing it would have assessed the potential impact on the substantive values involved, including plaintiff's environmental interests. Thus the issues that would have been before the Board (and are now before us) seem to me as fact-rich as one can imagine. This case implicates, as strongly as possible, the values of allowing the agency to correct possible

errors, to employ its expertise, and to build an intelligible record for judicial review.

The district court also found that the department regulation permitting review of BLM decisions by the Interior Board of Land Appeals did not open the door to one in plaintiff's position. It reads:

(a) Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management or of an administrative law judge shall have a right to appeal to the Board. . . .

43 C.F.R. § 4.410(a) (1986). See J.A. at 167.

Plaintiff had not been a "party" to a "case" before the BLM. But at least where there has been no formal adjudication before the BLM, the Board appears not to insist on any particular kind of participation before the agency. For example, in *Desert Survivors*, 80 IBLA 111 (1984), the Board said plainly, "As one adversely affected by a BLM decision on a protest, appellant is a party to the case." *Id.* at 113. It went on to note that appellant had been an active participant in the planning of the Wilderness Study area in question and the development of the mining plan at issue; but it in no way suggested that this was a requirement of standing. While the Board might conceivably limit appeal to participants below, *Desert Survivors* hardly stands for the proposition that it now does so. Even if it did, plaintiff itself claims to have corresponded on these matters with high-level officials within the Department for over a year, Brief for Appellee at 56, and offers no reason to believe that such involvement would not meet whatever precondition might possibly be inferred from *Desert Survivors*.

The only other decision to which anyone has called our attention, *Park County Resource Council, Inc. v. Department of Agriculture*, 613 F.Supp. 1182 (D.Wyo.1985), *aff'd on other grounds*, 817 F.2d 609 (10th Cir.1987), ap-

pears of marginal relevance. Plaintiffs sought review of challenges to the BLM's issuance of (1) an oil and gas *lease* and (2) a drilling *permit*. The district court applied the doctrine of exhaustion to the lease dispute, as plaintiff had never sought IBLA review. This obviously reflected the court's assumption that IBLA review was available. As the point was evidently not argued, and we have no information about plaintiffs' participation before the BLM, the court's assumption sheds no light on the proper construction of § 4.410(a). On appeal, the Court of Appeals for the 10th Circuit rejected the district court's application of exhaustion to the lease dispute, on a variety of grounds. Insofar as it found IBLA unavailable as an administrative avenue of redress, it did so *only* on the grounds that the time limit had run. 817 F.2d at 619. I do not take the majority here to be adopting the view that exhaustion is excused whenever parties let the time for administrative review expire, a proposition as novel as it would be destructive.

Finally, the district court believed that exhaustion would be futile, that the record showed the department irreversibly committed to its view of the law. J.A. at 169. But departmental commitment to a particular view of the law would not show futility at all: administrative proceedings focused on the actual decisions and tracts would undoubtedly have clarified the *relation* between facts and law, the critical element in this case.

Accordingly, I believe the district court abused its discretion in rejecting the exhaustion defense.

### C. Indispensable parties

Federal Rule of Civil Procedure 19 orders the joinder of certain parties where it is feasible to do so, and it appears to be assumed on all hands that this standard is met by the

holders of certain types of property interests on the public lands affected by this litigation: those whose titles (perfected or inchoate) depend upon terminations or revocations made since January 1, 1981. Such parties' interests are directly affected by the district court's preliminary injunction (in its ultimate form), for it bars the defendants from taking any administrative action dependent on such terminations or revocations, "including, but not limited to" granting of rights-of-way or approval of plans of operations. Thus, for example, the holder of a mineral lease will not be able to secure approval of any application for a permit to drill; without the permit, of course, he cannot make his lease productive. Similarly, a holder of mining claims will not be able to secure approval of plans of operations, which is required for operations involving five or more acres, see 43 C.F.R. § 3809.1-4 (1986); this disability condemns such claims at least temporarily to barrenness.

When such parties are identified under Rule 19(a) and cannot be joined, Rule 19(b) requires the court to consider four factors in choosing whether the litigation should proceed or be dismissed:

The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

The district court proceeded through the required analysis, finding the balance to tilt in favor of permitting

the suit to continue. Courts of appeals typically review such findings under an "abuse of discretion" standard. See *Northern Alaska Environmental Center v. Hodel*, 803 F.2d 466, 468 (9th Cir.1986); *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305, 1309 (5th Cir.1986); *Envirotech Corp. v. Bethlehem Steel Corp.*, 729 F.2d 70, 75 (2d Cir.1984). Here I believe there has been no abuse.

The district court understandably stressed item four—the difficulties that plaintiff would encounter if unable to proceed here. J.A. at 147-48. If application of Rule 19 to this situation generated the principle that the administrative challenge could not proceed in the absence of such property owners, then plaintiff could secure adjudication only by bringing separate suits in each of the 17 states where federal land has been affected by the asserted administrative delinquencies. Normally 17 suits would not seem a hopelessly large number for litigation affecting 180 million acres of land. Each lawsuit would apply on average to more than 10 million acres, which for most of us is quite a lot. Nonetheless, it would entail a multiplication of the litigation, perhaps for little advantage.

On the other hand, the district court squarely confronted the difficulties that non-participation could inflict on the absentees. By forcing the defendants automatically to deny approval of plans of operations, the injunction denies mining claimants exclusive possessory rights to which they are otherwise entitled by law, 30 U.S.C. § 26 (1982). It erects similar barriers to mineral lessees. (The majority's suggestion that the "right [of holders of such property interests] to use and enjoyment of that property is not affected by the court's order," Maj. at 315, is simply incorrect. And see *Sierra Club v. Peterson*, 717 F.2d 1409, 1414 (D.C.Cir.1983) (under usual mineral lease Interior has no absolute right to preclude development).) Further, the court noted that as only the absent parties could

measure the value of their interests and the effect of the prospective impairments, the presence of defendants and intervenor Mountain States Legal Foundation was not a complete substitute for their own direct involvement. J.A. at 146-47.

Nevertheless, seeing little impact from the other two Rule 19 factors—the risk that a judgment rendered in the absence of the omitted parties might not afford plaintiff relief and the court's ability to reduce the prejudice to absentees by the shaping of relief—the court found dismissal unsuitable.

Of course under the Due Process clause of the Fifth Amendment persons normally cannot be bound by litigation to which they were not parties or privies. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n. 7, 99 S.Ct. 645, 649 n. 7, 58 L.Ed.2d 552 (1979) (“It is a violation of due process for a judgment to be binding on a litigant who was not a party nor a privy and therefore has never had an opportunity to be heard”); *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940). We may assume, then, that the absentees are not legally bound by this adjudication. Yet their interests are severely affected, in the ways acknowledged by the trial court.

In considering whether this outcome is acceptable under Rule 19 and the Due Process clause, the remedies available to the absentees are surely relevant. Assuming that they are not legally bound, I take it that, for example, a mineral lessee that was denied a drilling permit to which it would otherwise be entitled could seek judicial relief against the BLM. A federal court outside this district would not be bound by the decision in the trial court or here, and, if it viewed the law differently, might order relief. In addition, such parties could protect their interests—at some expense—by intervening in the litigation here. (Their interest in the *stare decisis* effect of this litigation would likely en-

title them to intervention as of right under Fed.R.Civ.P. 24(a)(2); see *Nuesse v. Camp*, 385 F.2d 694, 701-02 (D.C. Cir.1967); *Atlantis Development Corp. v. United States*, 379 F.2d 818 (5th Cir.1967).)

Moreover, administrative litigation commonly inflicts drastic effects on absent third parties. Perhaps the most radical example is that culminating in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954), imposing federal price controls on independent gas producers' wellhead sales of gas into the interstate market. Legal interpretations emerging from such proceedings are legitimized (we hope) by the crucible of litigation—the presence of parties motivated to present a neutral court with the most persuasive arguments. Though the parties here are not complete substitutes for the absent ones, as the district court acknowledged, the potential unfairness seems in accord with what we often tolerate.

## II. THE PRELIMINARY INJUNCTION

As relevant here, NWF has challenged (1) the Secretary's termination of classifications—covering 160.8 million acres of federal land—without legally sufficient “land use plans” and (2) the Secretary's revocation of withdrawals—affecting 20 million acres—without adequate public participation. In order to prevent these actions from leading to shifts in the character of the lands until its claims are adjudicated, NWF sought and obtained a preliminary injunction staying the effects of the Secretary's actions.

“It goes without saying that an injunction is an equitable remedy. It ‘is not a remedy which issues as of course.’” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311, 102 S.Ct. 1798, 1802, 72 L.Ed.2d 91 (1982) (citation omitted). A party seeking a preliminary injunction must prove that

the balance of four elements favors such relief:

- (1) the plaintiff's likelihood of success on the merits;
- (2) the threat of irreparable injury to the plaintiff absent the injunction;
- (3) the possibility of substantial harm to other parties caused by issuance of the injunction;
- and (4) the public interest.

Maj. at 318 (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13, 102 S.Ct. 1798, 1803, 72 L.Ed.2d 91 (1982); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir.1977)). I believe that NWF fails this test.

#### A. Classification Terminations

NWF maintains that the Secretary has violated § 202 of FLPMA, 43 U.S.C. § 1712 (1982), by terminating land classifications on 160.8 million acres of federal lands without adequate land use planning. The Secretary has terminated a classification order only if it fell within one of four categories:

- a. The order does not include any segregative language, e.g., merely "classified for retention," since the retention-disposition issue was resolved by Section 102 of FLPMA.
- b. The order segregates against applications under laws which were repealed by FLPMA.
- c. The order segregates against discretionary land laws . . . and a Management Framework Plan (MFP), Resources Management Plan (RMP), or special area plan . . . is in place and provides an adequate basis for acting on applications which may be filed under those laws.
- d. The order segregates against operation of the mining laws, but the lands involved do not contain minerals of more than nominal value, . . . and there

has been no serious interest expressed in mineral development.

Organic Act Directive No. 81-11, at 2 (June 18, 1981), J.A. at 97-B.

It seems highly unlikely that the reclassifications falling in categories (a), (b) or (d) would result in any new entry, development or disposal. Indeed, NWF makes no such claim. Rather, it focuses its attack on a subset of category (c) reclassifications—those based on MFPs, a designation used by the BLM for plans prepared *before* the adoption of FLPMA. (There is no revelation by the district court why the injunction should address reclassifications under (a), (b) or (d).)

Section 202(d) provides that "[t]he Secretary *may* modify or terminate any [land] classification consistent with . . . land use plans" that have been "developed pursuant to this section." 43 U.S.C. § 1712(d) (1982) (emphasis added). Section 202(c) enumerates nine criteria for the development of plans<sup>3</sup> and § 202(f) requires the Secretary

<sup>3</sup> Section 202(c) provides as follows:

- (1) use and observe the principles of multiple use and sustained yield set forth in this and other applicable law;
- (2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;
- (3) give priority to the designation and protection of areas of critical environmental concern;
- (4) rely, to the extent it is available, on the inventory of the public lands, their resources, and other values;
- (5) consider present and potential uses of the public lands;
- (6) consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;
- (7) weigh long-term benefits to the public against short-term benefits;
- (8) provide for compliance with applicable pollution control

to provide an opportunity for public involvement. 43 U.S.C. §§ 1712(c), (f). Since MFPs by definition antedate FLPMA, NWF argues that they have necessarily not been "developed pursuant to this section [§ 202]," and accordingly do not provide a legal basis for reclassification. See Brief for Appellee at 27-30.

laws, including State and Federal air, water, noise, or other pollution standards or implementation plans; and

(9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located, including, but not limited to, the statewide outdoor recreation plans developed under the Act of September 3, 1964 (78 Stat. 897), as amended [16 U.S.C.A. § 4601-4 et seq.], and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive, the Secretary shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

NWF's theory builds, of course, entirely on a negative pregnant: from the authorization of classification decisions based on § 202 plans, it infers an absence of authority to make such decisions without them. In fact the full context of § 202 militates against drawing such an inference in the rigid form required for NWF to prevail.

In enacting FLPMA, Congress made clear not only its familiarity with the BLM's land use planning procedures, but its approval. It seems fair to infer that Congress contemplated reliance on pre-FLPMA plans when they substantially conformed to the process specified in § 202, at least for some time.

FLPMA arose in large part out of the Report of the Public Land Law Review Commission, *One Third of the Nation's Land* (1970), which specifically appraised the quality of land-use planning by the BLM. Far from finding the existing practices defective, it appeared to regard them as deserving codification. First the authors described the process:

BLM's recent [land use planning] efforts appear to require consideration of the following general categories of factors in varying degrees: physical and locational suitability of the lands or resources for obvious purposes; supply of resources and demand for resource products; communities and users dependent on the public lands and resources; environmental factors; impact on state and local governments; efficiency of resource use and sustained yield of renewable resources; and regional economic growth.

*Id.* at 46. Then it commended them and proposed their use by Congress as at least the foundation of a codified scheme for land-use planning:

We have profited by this implementation of the Classification and Multiple Use Act and endorse the gen-

eral planning approach embodied in that system. It is now time for Congress to rely on this experience by establishing legislatively those factors that should be considered in all Federal land use planning. The factors identified in the preceding paragraph provide an adequate starting point.

*Id.*

The elements identified in the first paragraph clearly correspond to a large degree with those specified in § 202. Congress apparently accepted the Commission's favorable judgment. The House Committee Report observed:

The Committee is well acquainted with the land use planning systems of the Bureau of Land Management and the Forest Service and has found them to be consistent in general principles and practices with the objectives of H.R. 13777.

H.R.Rep. No. 94-1163, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin.News 6175, 6179.

The legislative history thus suggests two points: First, as the statutory mandate for § 202 plans was derived from BLM practice, there is every reason to suppose that pre-FLPMA plans, or at least many of them, would substantially correspond to the statutory requirement. Second, in view of that congruence, Congress is likely to have expected that the BLM would employ MFPs rather than, in every case, re-invent the wheel. The district court in fact acknowledged that the "MFP's [sic] may confirm [sic] to the general principles of the FLPMA," but then asserted that "they are not identical substitutes to RMP's [sic] [post-FLPMA plans developed in explicit effort to comply therewith]. The land use plans Congress envisioned would modify existing plans in several aspects, including public participation." J.A. at 153. Though obscure, the record

here suggests that the MFPs used to effect reclassifications did conform to the requirements of § 202, most particularly including public participation.

The Department of Interior has promulgated regulations allowing the BLM to rely on an MFP to terminate a classification only if the MFP meets criteria closely paralleling those of § 202. Under 43 C.F.R. § 1610.8(a)(1) (1986), MFPs can support reclassifications only where they [1] "shall have been developed with public participation and government coordination. . . ." and [2] "shall be in compliance with the principle of multiple use and sustained yield." Assuming that Interior has adhered to this regulation (and there are no claims of non-adherence), the first criterion assures that none of the terminations here at issue can have violated § 202 in the single aspect specified by the district court as a potential discrepancy (and the feature most stressed by plaintiff). Moreover, the second criterion—planning in accordance with multiple use, sustained yield principles—is not only the first requirement of § 202(c), but is likely to entail compliance with the other features of its list, *e.g.*, protecting critical environmental areas, inventorying potential resources, considering present and potential uses, considering relative scarcity of the different values involved, and weighing long-term against short-term benefits. Thus the likelihood is very great that the relevant MFPs substantially comply with § 202.

Apart from the implications from 43 C.F.R. § 1610.8 (a)(1), the record is a complete blank. We do not know whether any of the plans fell short of other criteria in any significant respect—or in any insignificant one, for that matter. Not a single MFP was before the court. Not one is before us now. This is a novelty: adjudication in a vacuum. None of the judges in this proceeding—neither the district court, the majority, nor I—has any basis for

concluding that the MFPs relied on do not mirror RMPs in all substantive respects.

FLPMA and its context support the view that substantial compliance with § 202 should suffice for some time after enactment. Congress explicitly recognized that § 202 land use plans would not come into existence overnight; in a general provision on supervision of the public lands, it directed the Secretary to manage them pursuant to such plans "when they are available." 43 U.S.C. § 1732(a). Of course this general clause could co-exist with congressional insistence on 100% pure § 202 plans for classification decisions, but it surely counsels against finding a highly restrictive negative pregnant in § 202(d). A comparison of FLPMA with Congress's 1976 amendments to the Forest and Rangeland Renewable Resources Act of 1974, adopted the day after FLPMA, also militates against such an absolutist view. There Congress directed the Secretary of Agriculture to "attempt to complete" the upgrading of national forest planning by September 30, 1985. See 16 U.S.C. § 1604(c) (1982). Congress not only "knew how" to impose a deadline, as the saying goes, but when it did so in a parallel instance on almost the same day, it allowed nearly a decade and even at that required only an "attempt."

The district court recognized that the statute contemplated "temporary" reliance on MFPs, but concluded that the BLM had exceeded the limits of this tolerance. J.A. at 153.<sup>4</sup> Therefore it concluded that NWF was substantially likely to prevail on the merits of its claim. The district court did not explain its apparent belief that reliance on MFPs should become unlawful at some specific date—regardless of how closely the MFPs conformed to the substance of § 202.

<sup>4</sup> The majority appears to repudiate that concession of the district court. Maj. at 321.

These considerations carry still worse implications for plaintiff when we turn to the issue of irreparable harm. Harm for such purposes is of course defined in terms of the evil that the particular statute was designed to prevent. Thus, in *Amoco Production Co. v. Village of Gambell*, — U.S. —, 107 S.Ct. 1396, 1403, 94 L.Ed.2d 542 (1987), the defendants had neglected to hold certain hearings and to make certain findings. The Court (assuming the applicability of the requirements and their violation) held that an injunction was improper, in light of district court findings that the conduct enjoined would not adversely affect "subsistence uses" of land, the statutorily protected value. *Id.* at 1403-04. The court below, it observed, "erroneously focused on the statutory procedure rather than on the underlying substantive policy." *Id.* at 1403. See also *Weinberger v. Romero-Barcelo*, 456 U.S. at 314, 102 S.Ct. at 1804.

Here, even if we assume illegality under § 202, the district court had no basis for finding that such illegality would likely generate an adverse effect on the values implemented by § 202. That section manifests an intent that the public lands be managed in accordance with a planning approach that balances the many potential values to which they may be put and that allows public participation in that process. See note 3, *supra*. As the district court did not review a single MFP, plainly it was in no position to find that any fell materially short of fulfilling those purposes. What little we know suggests that there was no such shortfall. Cf. *Natural Resources Defense Council, Inc. v. Hodel*, 624 F.Supp. 1045 (D.Nev.1985) (reviewing and upholding MFP relied on by BLM after December 1982 for livestock grazing decision), *aff'd*, 819 F.2d 927 (9th Cir.1987). Moreover, it may well be that the bulk of the developmental activities restricted by the preliminary injunction would occur (if not blocked) on lands so barren

and so distant from areas of potential recreation that they could not jeopardize plaintiff's recreational interests.

Offsetting this doubtful threat to plaintiff's interests is the obvious effect on the absent holders of interests dependent upon the challenged terminations. For commercial interest holders, an investment is tied up for an indefinite period, all chance of any return denied. *Cf. First English Evangelical Lutheran Church v. County of Los Angeles*, — U.S. —, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). Further, and bizarrely, the preliminary injunction is now preventing land exchanges of such an obviously benign character that even *plaintiff* favors them. NWF sought to voluntarily dismiss its claim as to a tract slated for exchange by the Forest Service, under which it would give up interests already developed for vacation resort purposes and would secure the one remaining private inholding in an area proposed for Wild and Scenic River study status. See Excerpt of Record for a Writ of Prohibition ("E.R.") 180-84. The district court, however, hewed to its absolutist view of the law and denied relief. See E.R. 260. The preliminary injunction has also blocked a similar exchange between the Forest Service and the Trust for Public Land. See E.R. 175-79. At no point has the district court made any inquiry into the intersection of plaintiff's and the absentees' claims — *i.e.*, what areas of potential recreation are potentially threatened by the absentees' efforts to exercise their entitlements or to proceed with planned transactions.

Finally, the public interest does nothing to tilt the balance in favor of the injunction issued. Congress has manifested a deep interest in environmental concerns, but it has also shown an intention to allow reasonable development of mineral resources on the public lands. See 30 U.S.C. § 21(a) (1982) (it is the "continuing policy of the Federal Government . . . to foster and encourage private

enterprise in . . . the development of economically sound and stable domestic mining . . . [and] mineral reclamation industries, [and in] the orderly and economic development of domestic mineral resources . . . to help assure satisfaction of industrial, security and environmental needs"); 43 U.S.C. § 1701(a)(12) (1982) (announcing policy that "public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals"); *National Coal Association v. Hodel*, 825 F.2d 523, 529-30 & n. 8 (D.C.Cir.1987). Both interests are of great value; but in issuing the preliminary injunction the district court has made no effort to make marginal adjustments: to identify those areas where environmental interests are in real jeopardy from substantive administrative lapses from congressional mandated duties. The denial of relief even for exchanges favored by all parties appears to manifest a legalistic zeal quite inconsistent with the balancing that is required for preliminary injunctions.

Accordingly, there is no basis for the sweeping injunction here issued, halting all steps that the Secretary might take that depend on the challenged terminations.

#### B. Withdrawal Revocations

Since the passage of FLPMA, the Secretary has issued 671 public land orders revoking withdrawals affecting nearly 20 million acres. J.A. at 61. NWF contends that these actions are illegal because the Secretary failed to provide the public an opportunity to participate in each withdrawal revocation, in violation of FLPMA § 309(e), 43 U.S.C. § 1739(e). That section provides:

In exercising his authorities under this Act, the Secretary, by regulation, shall establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the

public adequate notice and an opportunity to comment upon the formulation of standards and criteria and, to participate in, the preparation and execution of plans and programs for, and the management of, the public lands.

The district court found it likely that these limitations applied to the withdrawal revocations. J.A. at 155.

The Secretary argues that § 309(e) is intended to be precatory only, and in the alternative that it covers *planning* only.

The relation of § 309(e) to FLPMA as a whole lends some support to the Secretary's view of it as precatory. Section 309(e) is the last subsection of a section providing for the creation and use of citizen advisory councils. That section is in turn the last provision in subchapter III, governing "Administration." At various points along the way, FLPMA provides explicitly for public participation. Thus, § 204(h) requires a public hearing for new withdrawals. § 204(i) requires, for a special class of revocations, an elaborate, multi-stage review by the President and Congress; beside the requirements of § 204(i), the references in § 309(e) to giving "the Federal government" notice and opportunity to comment appear rather pale. Finally, as noted above, § 202(f) requires public participation in the land-use planning process. The location in a general administrative provision, the generality of language, and the presence of specific mandates elsewhere make it at least plausible to suppose that Congress intended § 309(e) only as an exhortation.

It seems fair to regard § 309(e)'s character as at best ambiguous. Thus under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the Secretary's reading of it as precatory is entitled to deference so long as it is a reasonable one. I believe it passes that test.

The defendants' alternative argument, limiting § 309(e) to planning activities, has some support in the legislative history,<sup>3</sup> but seems less plausible. Congress had, after all, explicitly required public participation in the planning process in § 202(f), so that renewal of the mandate in § 309(e) would be oddly duplicatory. In asserting the planning-only theory, however, the Secretary points to various mechanisms by which the public is brought into decisions *executing* the plans. Although the Secretary does not frame the argument as one of substantial compliance, his contentions inevitably suggest such a finding. If there is an opportunity for public participation in the BLM's exercises of *material discretion* down the line from planning, it is hard to classify its failure to provide automatically for public participation in withdrawal revocations as a material breach of § 309(e), even assuming it to be mandatory and to encompass individual "management" decisions.

Indeed, key decisions by which the government may shift title to private parties, or otherwise permit development activities, appear to be governed by regulations giving the public a role. The Secretary notes, for example, department regulations requiring the BLM to give public notice before making a land exchange, 43 C.F.R. § 2201.1 (a) (1986) (notice to be provided through the Federal Register and local newspapers, and to be sent directly to state and local officials, with a 45-day period for com-

<sup>3</sup> Such history focuses generally on the value of public participation in planning, see, e.g., *One Third of the Nation's Land* 57 (Recommendation 11); H.R.Rep. No. 94-1163, 94th Cong., 2d Sess. 7 (1976), U.S.Code Cong. & Admin.News 1976, p. 6181 (commentary on draft section that emerged as § 202(f)); but see S.Rep. No. 94-583, 94th Cong., 1st Sess. 106-07 (1975) (correspondence arguably supporting application of § 309(e) to "management" decisions other than planning).

ment). See also *id.* § 2711.1-2 (1986) (similar, for sales); *id.* § 2802.4(d) & (e) (similar, for issuance of rights of way); *id.* § 2741.5(h) (similar, for grants under Recreation and Public Purposes Act, 43 U.S.C. § 869 *et seq.* (1982)).

The mining laws, however, particularly the Mining Act of 1872, 30 U.S.C. § 21 *et seq.* (1982), allow entry without BLM issuance of title. This might appear to create a gap. But regulations governing the environmental review process under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (1982), appear to close it up. § 5.4B(8), Appendix 5 to Chapter 6, Part 516 of Departmental Manual, appears by implication to require an environmental assessment ("EA") or environmental impact statement ("EIS") where termination or revocation would open lands to mining laws and the lands contain minerals of more than nominal value. 47 Fed.Reg. 50371 (Nov. 5, 1982); see also BLM Reply Brief at 17 (so construing § 5.4B(8)). Cf. *National Forest Preservation Group v. Butz*, 485 F.2d 408 (9th Cir.1973) (requiring a NEPA statement when the government enters an *exchange* under which private parties will acquire land on which they will engage in activities materially affecting the environment). Other regulations provide for public participation in the preparation of an EA or EIS. See 40 C.F.R. § 1501.4(b) (requiring involvement of the public "to the extent practicable" in preparing EAs); *id.* § 1503.1(a)(4) (providing for solicitation of public comment in preparation of an EIS). If the BLM follows these regulations as it construes them here, they assure public participation for precisely the withdrawal revocations that might jeopardize plaintiff's interests.

Moreover, even a nominal opening to entry under the mining laws preserves the department's opportunity to exercise discretion, together with a chance for the public to be heard. Departmental regulations require BLM approval

for any mining operations disturbing more than five acres, 43 C.F.R. § 3809.1-4, and the approval process requires an EA, *id.* § 3809.2-1. If the EA indicates that there is "substantial public interest" in the proposed plan, the officer in charge must arrange for public notice and consideration of public comments. *Id.* § 3809.2-1(c).

Again the record on these matters is completely deficient. Although it appears to be conceded that the revocations expose some lands in the vicinity of areas used by plaintiff's members to the risk of development, see pp. 329-330 *supra*, there is no evidence suggesting that want of public participation in withdrawal revocation procedures played any material role in creating this risk. If, for example, these revocations followed EAs or EISs under § 5.4B(8) of the Departmental Manual, public notice and opportunity to comment presumably occurred — unless the expected environmental effects were modest.<sup>6</sup>

As in the case of classification terminations, the leap to irreparable injury is an athletic one. If the withdrawal revocations that might lead to actual mining activity were made after public notice and opportunity to comment under § 5.4B(8) of the Departmental Manual, then want of public participation formally linked to § 309(e) would be irrelevant. Similarly, if (1) a revocation occurred without public opportunity for participation, but (2) later discretionary decisions triggered public notice and opportunity to comment, and (3) in those proceedings the fact of

<sup>6</sup> It seems inescapable that § 309(e), even if mandatory, does not require public participation in *every* management decision. For example, the Secretary's regulations permit persons to engage in mining activities disturbing an aggregate of five acres or less (including access) per year merely on notice to the Secretary and without his approval. 43 C.F.R. § 3809.1-3 (1986). This excludes the public, but is surely permissible if public participation is not to be insisted upon simply as a fetish.

revocation did not materially reduce the range of real-world considerations that members of the public could invoke (*i.e.*, considerations other than the technical existence of the withdrawal itself), there would be no harm from the omission. See *Amoco Production Co. v. Village of Gambell*, 107 S.Ct. at 1403. But none of this is explored. Plaintiff has chosen to paint with a very broad brush, and the district court has accommodated its program. I would remand for examination of these issues.<sup>7</sup>

Finally, the interests of third parties and the public interest work against the preliminary injunction as they did in the classification context. The injunction bars absentees from exercise of their rights, for an indefinite period; it makes no effort to minimize the *aggregate* harm to the public interests in both environmental preservation and alternative activities: the district court has allowed environmental interests, however weak and however trivially

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<sup>7</sup> In addition, certain of the revocations were subject to § 204(f), which requires the Secretary to review specified withdrawals within 15 years of FLPMA's enactment and to submit to the President a report giving his recommendations as to whether they should be continued. The President is to forward the report to Congress, along with his recommendations. The Secretary is free to terminate withdrawals only when 90 days have passed without Congress having exercised a legislative veto. The procedure is now obviously questionable under *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), as is the status of the Secretary's authority assuming invalidation of the legislative veto. See *Alaska Airlines, Inc. v. Brock*, — U.S. —, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987) (discussing the severability of statutes from their legislative veto provision). I would remand for consideration of NWF's claim that the Secretary disregarded the § 204(f) process. Of course, my opinion on the claims under §§ 202(d) and 309(e) is only a dissent. Nonetheless, as the district court has not yet finally resolved the substantive claims, some attention to the § 204(f) claim may be in order in connection with that process if my reading of those sections has any merit.

they may be at risk as to particular tracts, to sweep the other interests off the board.

Though concurring on the finding of standing and satisfaction of Rule 19, I dissent.

## APPENDIX D

UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT

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No. 86-5239

NATIONAL WILDLIFE FEDERATION

v.

ROBERT F. BURFORD, ET AL., APPELLANTS  
MOUNTAIN STATES LEGAL FOUNDATION, ET AL.

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No. 86-5240

NATIONAL WILDLIFE FEDERATION

v.

ROBERT F. BURFORD, ET AL., MOUNTAIN  
STATES LEGAL FOUNDATION, ET AL., APPELLANTS

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April 29, 1988

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## ON PETITIONS FOR REHEARING

Before MIKVA and WILLIAMS, Circuit Judges, and  
WEIGEL,\* Senior District Judge, United States District  
Court for the Northern District of California.

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\* Sitting by designation pursuant to 28 U.S.C. 294(d).

## ORDER

PER CURIAM.

Upon consideration of the petitions for rehearing of the  
federal appellants and of Mountain States Legal Founda-  
tion it is

ORDERED, by the Court, that the petitions are denied,  
and it is

FURTHER ORDERED, by the Court, *sua sponte*, that  
the Clerk is directed to issue the mandate in these cases  
forthwith.

A memorandum of the Court is attached.

## MEMORANDUM

PER CURIAM:

On December 4, 1985, the district court issued a pre-  
liminary injunction enjoining the Director of the Bureau  
of Land Management, the Secretary of the Interior, and  
the Department of the Interior from reclassifying or re-  
voking restrictions on 180 million acres of public lands  
located in 17 states. The details of that injunction as well  
as the underlying litigation and the contentions of the par-  
ties have been summarized in the earlier opinion of this  
court upholding the district court injunction. See *National  
Wildlife Federation v. Burford*, 835 F.2d 305  
(D.C.Cir.1987). Appellants filed petitions for rehearing  
and suggestions for rehearing *en banc*, which are currently  
pending before this court.

It has been over two years since the preliminary injunc-  
tion was issued. As we stated in our opinion, "[t]his is a  
serious case with serious implications." 835 F.2d at 327.  
We noted then, and continue to believe, that some of the  
criticisms of the breadth and scope of the preliminary in-  
junction offered in the vigorous dissent are not without

force. In addition, we are aware that the district court injunction has placed on "hold" for over two years a complex governmental effort to review and adjust its classifications of vast tracts of land. It is also beyond dispute that countless parties are affected by the uncertainties associated with the unsettled status of these lands. For these reasons, we believe that the disposition of these millions of acres should not continue to rest any longer than necessary on the foundation of a preliminary injunction which was entered on consideration of the brief affidavits and cursory materials presented to the court below.

While this case continues to pend in our court, the district court has not gone forward with plenary consideration of the merits. The court hereby denies the petitions for rehearing and issues its mandate forthwith with directions to the parties and the district court to proceed with this litigation with dispatch.

*It is so ordered.*

# APPENDIX E

## UNITED STATES DISTRICT COURT DISTRICT OF COLUMBIA

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Civ. A. No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS

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Dec. 4, 1985

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### MEMORANDUM OPINION

JOHN H. PRATT, District Judge.

#### *Introduction*

Plaintiff, an environmental organization, brought suit against the Director of the Bureau of Land Management, the Secretary of the Interior and the Department of the Interior to challenge the lifting of protective restrictions on certain federal lands. Plaintiff's cause of action arises under the Federal Land Policy and Management Act, the National Environmental Policy Act of 1969 and the Administrative Procedure Act. The case is now before us on a motion to intervene by Congressman John F. Seiberling, defendants' motion to dismiss and plaintiff's motion for a preliminary injunction.

### Background

This litigation focuses on defendants' termination of protective classifications and revocation of withdrawals on approximately 170 million acres of public lands since 1981. The Federal Land Policy and Management Act, 43 U.S.C. §§ 1701 *et seq.* (1982) (FLPMA), establishes comprehensive rules for the management of federal lands. The FLPMA includes two systems for preserving land in the public domain and thereby for protecting it from private ownership and development. "Classifications" allow the Department of the Interior to categorize lands according to their proper use. "Withdrawals" directly remove lands from private development and exploitation. Subject to certain procedural controls, the Secretary of the Interior may open land to private development by terminating the applicable classification or withdrawal. See 43 U.S.C. §§ 1712(d), 1714. Since the passage of the FLPMA in 1976, defendants have terminated classifications on 160.8 million acres of land, Parker Affidavit at ¶ 35, and revoked withdrawals for 20 million acres, Edwards Affidavit 1A at ¶ 25.

Plaintiff contends that in lifting these restrictions, defendants improperly ignored certain requirements of the FLPMA. Among plaintiff's claims are that defendants failed to review land status actions in the context of land use planning, to submit to the President and Congress withdrawal revocation recommendations, to promulgate rules and regulations governing withdrawal revocations, to provide for public participation, and to prepare environmental impact statements. Plaintiff ultimately seeks a declaration that defendants' land withdrawal program violates applicable law and regulations; an order both reinstating all withdrawals, classifications or other designa-

tions in effect on January 1, 1981<sup>1</sup> and enjoining defendants from taking any action inconsistent with these designations until they comply with their statutory obligations; and an order mandating that defendants rescind all directives, instructive memoranda, manuals or other documents regarding classification or withdrawal terminations until they have promulgated certain rules and regulations.

Plaintiff now moves for a preliminary injunction. The claim for relief here is more narrow than that in the Complaint. Specifically, plaintiff requests this court, *inter alia*, to enjoin defendants from modifying, terminating or altering any withdrawal, classification or other land use designation in effect on January 1, 1981,<sup>2</sup> and to enjoin them from taking any action inconsistent with the 1981 status quo. It "does not seek to invalidate existing mining claims or mineral leases nor does it seek to overturn completely sales or exchanges of previously withdrawn lands." Plaintiff's Reply Memorandum at 8-9.

In the meantime, defendants have moved to dismiss the entire action for failure to join indispensable [*sic*] parties, in particular the holders of mining claims and minerals leases on the disputed lands. They have also moved to dismiss Count II of the Amended Complaint, relating to failure to submit recommendations to the President and Congress, on the ground that the plaintiff lacks standing to raise this claim.

In addition to the motion for a preliminary injunction and motion to dismiss, we have before us a motion for

<sup>1</sup> Although the figures in this case focus on events since 1976, it appears that most if not all of the contested terminations occurred since January 1, 1981.

<sup>2</sup> Plaintiff never revised the motion, which refers to October 21, 1976, the date mentioned in the original Complaint. We believe, however, in light of both the Amended Complaint and the argument at the hearing, that plaintiff intends to focus on the 1981 date.

intervention. Congressman John F. Seiberling, Chairman of the House Subcommittee on Public Lands, seeks to intervene in this action as a plaintiff. We will address these three motions in reverse order.

#### Discussion

##### I. Motion for Intervention

Congressman Seiberling's motion to intervene invokes Federal Rules of Civil Procedure 24. Because we find that Congressman Seiberling meets the requirements for permissive intervention under Rule 24(b), we do not need to reach the question of whether he also qualifies under subdivision (a).

Rule 24(b) allows intervention "upon timely application" by a person whose claim or defense shares with the main action a common question of law or fact. Although Congressman Seiberling moved to intervene three months after the complaint was filed, we decline to hold that his motion was untimely. To begin with, the amount of time elapsed since the complaint does not itself determine timeliness. *Natural Resources Defense Council v. Costle*, 561 F.2d 904, 907 (D.C.Cir.1977); *Hodgson v. United Mine Workers of America*, 473 F.2d 118, 129 (D.C.Cir.1972). Instead, we must look both to the purpose for which intervention is sought and to the improbability of prejudice to those already in the case. *NRDC v. Costle*, 561 F.2d at 907; *Hodgson*, 473 F.2d at 129. Although Congressman Seiberling seeks to intervene for the full course of the litigation, we can see no possible prejudice to defendants as a result of the timing of this motion.

Having satisfied the threshold requirement of timely application, Congressman Seiberling also meets the substantive criteria of Rule 24(b)(2). Congressman Seiberling alleges that defendants violated § 204(f) of the FLPMA,

43 U.S.C. § 1714(f), which requires submission to Congress of recommendations for land withdrawal revocations. Plaintiff raises the same claim in Count II of its Amended Complaint. As these identical allegations thus clearly show, the motion to intervene presents common questions of law or fact.<sup>3</sup>

Defendant attempts to block intervention by arguing that Congressman Seiberling lacks the necessary injury in fact for standing. We disagree. It is not necessary to prolong this discussion with citations that injury in fact is a key requirement of standing. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970). If Congressman Seiberling was merely complaining that defendants have not faithfully executed the law, his claim, as a generalized grievance, would not constitute injury in fact. All citizens share his interest, *American Federation of Government Employees v. Pierce*, 697 F.2d 303, 305 (D.C.Cir.1982), and it is well settled that such "generalized grievances about the conduct of government" do not afford standing. *Flast v. Cohen*, 392 U.S. 83, 106, 88 S.Ct. 1942, 1956, 20 L.Ed.2d 947 (1968); *American Federation of Government Employees*, 697 F.2d at 305.

However, Congressman Seiberling is not seeking just to express a generalized grievance. He is suing to enforce his right as a Congressman to participate in withdrawal revocation decisions. Legislators have standing to challenge objective diminution of their influence in the legislative process. See *Harrington v. Bush*, 553 F.2d 190, 212 (D.C.Cir.1977); *Kennedy v. Sampson*, 511 F.2d 430, 434 (D.C.Cir.1975). In particular, executive action that nulli-

<sup>3</sup> Since the § 204(f) claim satisfies the standard of Rule 24(b)(2), we do not need to address the issue of Congressman Seiberling's defense of the provision's constitutionality.

fies a specific congressional opportunity to vote constitutes injury in fact to individual Members of Congress. See *Goldwater v. Carter*, 617 F.2d 697, 702 (D.C.Cir. 1979), *vacated on other grounds*, 444 U.S. 996, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979).

In the present case, the FLPMA requires the President to transmit to the President of the Senate and the Speaker of the House the Secretary's recommendations for withdrawal revocations. The statute further authorizes a concurrent congressional resolution that the recommendations should not be implemented.<sup>4</sup> Defendants' bypassing of the congressional review process thus denied to Congressman Seiberling the potential opportunity to approve or reject proposals to terminate specific land withdrawals. This diminution of Congressman Seiberling's authority caused injury in fact and thus guarantees his "personal stake in the outcome of the controversy." *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962).<sup>5</sup>

<sup>4</sup> As the government defendants note in their opposition to the preliminary injunction, this provision for concurrent resolution may be unconstitutional after *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). However, defendants do not request a ruling on its constitutionality, see Opposition to Motion to Intervene at 6, and we do not express an opinion on the issue. As long as this provision remains in the statute, the FLPMA promises to every Member of Congress the opportunity to vote on the Secretary's recommendations. It is of no concern that there is no ongoing legislative process, as Mountain States emphasizes. Mountain States Opposition at 11 n. 11. Here, defendants' failure to submit recommendations to Congress precluded such a process from even commencing. Congress had nothing to review.

<sup>5</sup> We reject defendants' suggestion that Congressman Seiberling cannot assert the interest of Congress in the absence of a congressional resolution authorizing such representation. Where a Member of Congress is not appointed to sue, he must demonstrate personal injury, *Harrington*, 553 F.2d at 199-200 n. 41. However, he can do so in-

Congressman Seiberling also fulfills the causation and redressability criteria for standing. A plaintiff must not only demonstrate injury in fact, but also show both that the injury can be traced directly to defendant's action. *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 3325, 82 L.Ed.2d 556 (1984); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1925-26, 48 L.Ed.2d 450 (1976), and that the relief he requests will redress the injury. *Id.* at 38, 96 S.Ct. at 1924. Mountain States Legal Foundation argues that because the statute channels the Secretary's recommendations through the President, Congressman Seiberling cannot satisfy either requirement. We reach a different conclusion. The statute allows the President no discretion. He *must* transmit to Congress the recommendations he receives. As a mere conduit for the Secretary's recommendations, the President does not interrupt the causal connection between defendants' actions and the lack of any reporting to Congress. Similarly, if defendants are ordered to report to the President, the mere implication that the President might withhold information from Congress and thus violate the express terms of the FLPMA does not threaten redress enough to interfere with standing.

Accordingly, we grant the motion to intervene.

directly by showing (1) injury in fact to Congress and (2) injury to himself, as an individual legislator, because of the harm done to the institution. *Id.* Here, Congress' exclusion from the withdrawal revocation process constitutes injury to Congress. Because of this exclusion, Congressman Seiberling lost a concrete opportunity to exercise his voting authority as a Member of Congress. The fact that he was also Chairman of the Subcommittee on Public Lands does not diminish his standing as an individual legislator. See *National Wildlife Federation v. Watt*, 571 F.Supp. 1145, 1147 (D.D.C.1983) (recognizing standing of Congressman Udall "as a Congressman and as a Committee Chairman").

## II. Motion to Dismiss

### A. Failure to Join Indispensible [sic] Parties

While the holders of mining claims and mineral leases are necessary parties, their absence does not compel dismissal. Defendants assert that plaintiff should have joined as defendants all third parties who hold mining claims or mineral leases to the lands at issue. Federal Rule of Civil Procedure 19 requires a two-step analysis for such compulsory joinder claims. First, the court must determine if the absent party falls within the category of persons "to be joined if feasible." Second, the court must determine whether, in equity and good conscience, the case should proceed without the third party or be dismissed. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 108-09, 88 S.Ct. 733, 737-38, 19 L.Ed.2d 936 (1968); *Defenders of Wildlife v. Andrus*, 77 F.R.D. 448, 451 (D.D.C.1978).

The mining claimants and lessees meet the first requirement of compulsory joinder, as set out in Rule 19(a). They all claim an interest in the lands that are the subject of this action. See Rule 19(a)(2). In the case of the mining claimants, this interest may even amount to exclusive possession and enjoyment. 30 U.S.C. § 26 (1982).

Furthermore, disposition of the action in their absence could impair or impede the ability of these parties to protect their interests. See Rule 19(a)(2)(i). If plaintiff's injunction is granted, such relief could suspend development of the third parties' interests. Until as late as 1991, defendants would be unable to issue patents, approve lease activities—in short, to authorize any commercial activity on these lands. Furthermore, if Congress rejects the Secretary's recommendations to revoke the withdrawals, those parties who now hold mining claims or mineral leases could lose their interest altogether. The fact that plaintiff

does not directly seek to void these interests is irrelevant. What matters is the effect of ultimate disposition of the case.

The third parties here could suffer harm not just by disposition of the action but by disposition in their absence. To be sure, the present defendants share the interest of these parties in resisting plaintiff's proposed injunction. In fact, the intervention by the Mountain States Legal Foundation, which represents a group of mining and milling lessees, ensures advocacy of at least some of the third parties' claims. However, only the absent parties can accurately measure the full value of the interests that they now hold and the extent to which that value could be impaired or lessened. Their absence weakens defendants' ability precisely to articulate the harm that plaintiff's requested relief would cause. In sum, it cannot be denied that these holders of mining claims and leases have legitimate interests.

Our finding that the mining claimants and lessees are necessary parties under Rule 19(a), however, does not end the inquiry. In determining whether or not to dismiss, we must consider and weigh (1) the extent of potential prejudice to these parties, (2) the possibility of avoiding this prejudice by shaping alternative measures of relief, (3) the adequacy of judgment in these parties' absence, and (4) the adequacy of plaintiff's remedy if we dismiss. Balancing these factors, we conclude that the action may proceed without the mining claimants and lessees. Our reasoning may be summed up in the discussion which follows.

The fact that dismissal of plaintiff's claims for relief in this court would effectively foreclose plaintiff from relief elsewhere outweighs the more speculative harm to the absent parties. As we discussed, *supra*, plaintiff's proposed injunction would suspend development of and, depending on plaintiff's success in obtaining permanent relief, could

possibly revoke existing claims or leases. Thus, if the case proceeds without the presence of the claimants or lessees, these third parties would suffer temporary hardship; the possibility of permanent harm, however, is only a matter of speculation.

In contrast, dismissal for failure to join would deny plaintiff an adequate forum in which ever to prosecute its claim. The availability of an alternative forum represents a "critical consideration" in deciding joinder questions. *Pasco International (London) Ltd. v. Stenograph Corp.*, 637 F.2d 496, 500 (7th Cir.1980). The lands involved in this case lie in seventeen different states. The absent parties probably cover an even broader geographical range. Because of problems of jurisdiction and venue, plaintiff could never join all defendants in one forum. Requiring it to bring seventeen separate lawsuits or even to combine actions through the device of multidistrict litigation would create enormous administrative disorder and delay. Dismissal, therefore, would effectively discourage and, for all practical purposes, put an end to this litigation. Balanced against the merely temporary or speculative harm to the absentees, this harsh result supports denial of the defendants' motion to dismiss.

The two other factors listed in Rule 19(b) do not influence our determination. If, as plaintiff contends, defendants have illegally terminated classifications and withdrawals, it may well be necessary to grant the injunction requested. Any lesser relief that sought to provide protection for the interest of third parties would have the effect of permitting defendants' actions to continue without further challenge. The third factor—adequacy of judgment in the third parties' absence—also does not enter into our decision, since their presence is not essential to shape the judgment.

The "public rights" exception provides further support for denial of the motion to dismiss. This doctrine derives from the teaching of *National Licorice Co. v. NLRB*, 309 U.S. 350, 60 S.Ct. 569, 84 L.Ed. 799 (1940), where the Supreme Court held that the NLRB could order an employer not to enforce certain illegal contracts with its employees, even though the employees, who had a vital interest in the matter, had not been joined. As the Court reasoned, "[i]n a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." *Id.* at 363, 60 S.Ct. at 577. Here, as in *National Licorice*, the plaintiff's cause of action is grounded in the assertion of public rather than private rights. The public's interest in disposition of federal lands and, more concretely, in participating in the management of these lands is a matter of transcending importance. It extends this case far beyond the boundaries of private dispute.

The specific facts of *National Licorice* do not limit the "public rights" exception to cases where the absentees' interest is being advanced. Subsequent courts have applied the exception even where disposition could harm the absent parties. *See, e.g., Jeffries v. Georgia Residential Finance Authority*, 678 F.2d 919 (11th Cir.1982), *cert. denied*, 459 U.S. 971, 103 S.Ct. 302, 74 L.Ed.2d 283 (1982); *Swomley v. Watt*, 526 F.Supp. 1271 (D.D.C.1981); *Natural Resources Defense Council, Inc. v. Berklund*, 458 F.Supp. 925 (D.D.C.1978), *aff'd per curiam*, 609 F.2d 553 (D.C.Cir.1979).

The policy behind the "public rights" exception emphasizes the need to permit plaintiff to proceed without joining the mining claimants and lessees. As Judge June Green noted in *NRDC v. Berklund*, 458 F.Supp. 925, the "public rights" exception serves to remove joinder as an obstacle

that might otherwise preclude litigation against the government. *Id.* at 933. Because plaintiff lacks an alternative forum, requiring joinder of all parties could foreclose forever a legitimate cause of action against the government. We cannot sanction such a Draconian result. We therefore have no difficulty in denying the motion to dismiss for failure to join indispensable [*sic*] parties.

#### B. Lack of Standing on Count II

Defendants argue that plaintiff National Wildlife Federation lacks standing on Count II of its Amended Complaint, the claim that defendants violated the FLPMA by failing to submit recommendations to the President and Congress. As well indicated at the hearing, National Wildlife Federation might lack standing if it stood alone. However, this issue has become moot because we have permitted Congressman Seiberling to intervene as a plaintiff. As we discussed above, Congressman Seiberling has standing. His standing is sufficient to shield Count II from defendant's motion to dismiss. Where one plaintiff has standing, we do not need to consider the standing of other plaintiffs. *See, e.g., Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 160, 102 S.Ct. 205, 212, 70 L.Ed.2d 309 (1981). Accordingly, we deny defendants' motion to dismiss Count II for lack of standing.

#### III. Motion for a Preliminary Injunction

In ruling on plaintiff's motion for a preliminary injunction, it is well settled that we must consider certain established criteria, *i.e.*, (1) the likelihood of plaintiff's success on the merits (2) the prospect of irreparable injury in the absence of relief (3) the potential harm to other interested parties, and (4) the public interest. *Washington Metropoli-*

*tan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C.Cir.1977). After weighing these factors, it is our judgment that a preliminary injunction should issue.

#### A. Likelihood of Success on the Merits

##### 1. Failure to Review Land Status Actions in the Context of Land Use Planning

In considering the likelihood of success on the merits of plaintiff's several claims, we consider only two of the more important. The first is plaintiff's claim that defendants improperly terminated land classifications without first preparing Resource Management Plans. We hold that there is a likelihood that plaintiff will succeed on the merits.

Section 202 of the FLPMA, concerning classifications, directs the Secretary of the Interior to develop "land use plans," which establish the use of the public lands. 43 U.S.C. § 1712(a). Subsection (d) further provides:

Any classification of public lands or any land use plan in effect on October 21, 1976, is subject to review in the land use planning process conducted under this section, and all public lands, regardless of classification, are subject to inclusion in any land use plan developed pursuant to this section. The Secretary may *modify or terminate any such classification consistent with such land use plan.*

42 U.S.C. § 1712(d) (emphasis supplied). Since 1976, defendants have terminated classifications affecting approximately 160 million acres of land. Yet, as plaintiff alleges and defendants do not deny, defendants have completed only a fraction of the land use plans for these areas. Thus, the vast majority of classification terminations have occurred outside the context of land use planning.

Defendants' reliance on "Management Framework Plans" (MFP's) is misplaced and does not satisfy the statutory expectations of "land use plans." As section 202(a) evidences, Congress sought a comprehensive system of land use plans. In its regulations, the Interior Department identifies these land use plans as "Resource Management Plans" (RMP's). 43 C.F.R. § 1601.0-5(k) (1984). It is true that Congress did not reject altogether existing MFP's. It recognized that RMP's would not be ready immediately, see 43 U.S.C. § 1732(a) (referring to land use plans "when they are available"), and it noted that BLM's pre-FLPMA system of land planning was consistent in general principles and practices with the objectives of the Act. H. Rep. No. 1163, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 6175, 6179.

However, looking at the matter in its totality, it is clear to us that Congress approved only temporary reliance on MFP's. It never authorized the vast scale of classification terminations without land use plans which we see today, more than nine years after the passage in 1976 of the FLPMA. MFP's may confirm to the general principles of the FLPMA, but they are not identical substitutes to RMP's. The land use plans Congress envisioned would modify existing plans in several aspects, including public participation. By terminating classifications for 160 million acres of land outside the context of land use planning, defendants have simply evaded the statute's directive that land use plans "shall be developed" and that the Secretary terminate classifications "consistent with such land use plans."

Defendants' obligation to review land status actions in the context of land use planning, however, does not extend beyond classification terminations. Plaintiff reads section 202(d) also to apply to withdrawal revocations, and it argues that defendants' failure to tie withdrawal revoca-

tions to land use planning thus violates the FLPMA. We disagree with plaintiff's reading of the statute. Classification terminations and withdrawal revocations are separate and distinct. Section 202(d) links land use planning to classification terminations. It never mentions withdrawal revocations, which appear in a separate section of the statute. See 43 U.S.C. § 1714. The history of classifications and withdrawals further contradicts plaintiff's equation of the two procedures. Classifications derive from the Classification and Multiple Use Act of 1964, Pub.L. No. 88-607, 78 Stat. 986, which expired in 1970. Withdrawals, on the other hand, date back to the nineteenth century and were executed by the Secretary largely without statutory guidance. Having developed along distinct paths, classification terminations and withdrawal revocations do not now merge in section 202(d), particularly since the statute separates the two terms. Therefore, plaintiff's likely success on its first claim applies only to defendants' terminations of land classifications.

## 2. *Lack of Public Participation*

Despite the statutory command, defendants have failed to provide for public participation in their withdrawal revocation decisions. Section 309(e) of the Act, 43 U.S.C. § 1739(e), requires the Secretary to establish procedures to give the public an opportunity "to comment upon the formulation of standards and criteria for, and to participate in, the preparation and execution of plans and programs for, *and the management of*, the public lands" (emphasis supplied). Defendants apparently have not permitted public input into their decisions to revoke land withdrawals. This lack of public participation both violates the text of the statute and frustrates Congress' intent that "[p]lanning decisions are to be made only after full oppor-

tunity for public involvement in the planning process." H. Rep. No. 1163 at 2, U.S. Code Cong. & Admin. News 1976, p. 6176. Defendants protest that they offer numerous avenues for public participation in land use planning. Yet the statute calls for participation also in the "management" of public lands. Withdrawal revocations fall into this "management" category. We find, therefore, that plaintiff is likely to succeed on this claim.

If plaintiff ultimately prevails on the two counts discussed, it could obtain the permanent injunction it seeks. Thus, in light of our conclusion that plaintiff will likely succeed on these counts, we do not need to reach the merits of plaintiff's other claims, including its claim that defendants failed to submit withdrawal recommendations to the President and the Congress as required by § 204(l) of the Act.

#### B. Irreparable Injury

We have no problem in holding that defendants' actions in lifting protective land restrictions will irreparably injure plaintiff's members unless enjoined. In ordering classification terminations and withdrawal revocations, defendants removed the only absolute shield against private exploitation of these federal lands. It is true, as defendants contend, that the classification terminations and withdrawal revocations do not immediately open the lands to mining and mineral leasing. They merely trigger the operation of certain discretionary land laws. Yet, as defendants also concede, some of the backup safeguards are optional. For example, the Secretary may choose whether or not to prepare an environmental impact assessment or statement. Transcript of September 16 Hearing at 54, 58. Moreover, neither the statutes nor the regulations can prohibit all development: they can only regulate its process.

If defendants have improperly terminated classifications or withdrawals to begin with, *any* allowance of mining or leasing can cause irreparable harm. Such activity can permanently destroy wildlife habitat, air and water quality, natural beauty and other environmental values. Defendants' suggestion that plaintiff's members can still hike, fish and otherwise enjoy these lands ignores both aesthetic interests and the process whereby a holder of a mining claim can gain the right to exclusive possession. Similarly, defendants' calculations limiting the acres that have actually been leased or mined<sup>6</sup> demonstrates nothing about the future impact of their actions. Without the preliminary injunction, defendants' termination of classifications and withdrawals could lead to the permanent loss of lands to public use and enjoyment—an injury we feel would be irreparable.

#### C. Harm to Interested Parties

While we acknowledge that the preliminary injunction would harm third parties, we do not view this injury as so serious as to outweigh the other factors supporting the injunction. The preliminary injunction would bar present holders of mining claims and mineral leases from developing their interests. To the extent they have made investments in obtaining their claims or leases or in beginning development, the delay in their investment return would represent financial injury. However, the preliminary injunction alone would not sever these parties' interests. If defendants prevail on the merits, it would only delay their realization. Furthermore, the injunction is not likely to reduce the ultimate value of the ore to be mined.

<sup>6</sup> Defendants claim that only 845 acres are being mined. See Hearing Transcript at 55. As the discussion of harm to private parties indicates, this is an axe that cuts both ways.

#### D. *The Public Interest*

The public interest clearly favors granting the preliminary injunction. In section 102 of the FLPMA, Congress declared "it is the policy of the United States that — (1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest." 43 U.S.C. § 1701(a)(1). This statement of policy, which provides the basis for plaintiff's claims for relief, underscores the public interest in ensuring orderly procedures for removing certain federal controls over government-owned lands. If defendants have violated the FLPMA in the process of terminating classifications and revoking withdrawals, the preliminary injunction will protect against further illegal actions pending resolution of the merits.

Furthermore, the preliminary injunction would serve the public by protecting the environment from any threat of permanent damage. Defendants' scenario of administrative havoc invokes a limited version of the public interest. While granting the preliminary injunction would inconvenience defendants and those parties holding specific interests in the lands at issue, denying the motion could ruin some of the country's great environmental resources — and not just for now but for generations to come.

For these reasons, we grant the plaintiff's motion for a preliminary injunction.

Orders consistent with the foregoing have been entered this day.

#### APPENDIX F

### UNITED STATES DISTRICT COURT DISTRICT OF COLUMBIA

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Civ. A. No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS

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Feb. 10, 1986

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#### MEMORANDUM OPINION

JOHN H. PRATT, District Judge.

Plaintiff National Wildlife Federation (NWF) has sued the Director of the Bureau of Land Management, the Secretary of the Interior and the Department of the Interior to achieve, *inter alia*, reinstatement of all land classifications and withdrawals in effect on January 1, 1981 until defendants take certain actions that plaintiff claims are required by law. This opinion addresses several pending motions.

#### *Background*

On December 4, 1985 we granted a preliminary injunction. The order included a prohibition against defendants' modifying, terminating, or altering any withdrawal, classi-

fication or other designation governing protection of the lands in the public domain that was in effect on January 1, 1981 or taking any action inconsistent with such withdrawals, classifications or other designations. It also enjoined all persons holding interests in the lands at issue from taking any action inconsistent with the present status of the lands.

Since our order of December 4, 1985, the parties have filed several motions. The federal defendants asked us to amend, reconsider and clarify the order. Defendant-intervenor Mountain States Legal Foundation (Mountain States) also moved for reconsideration and, in addition, for either reconsideration of our order denying its earlier motion to dismiss or, in the alternative, certification of the joinder issue to the Court of Appeals. Finally, plaintiff moved to consolidate a hearing on defendants' motions with a hearing on the merits.

We issued a stay of our preliminary injunction on December 16, 1985. On January 6, 1986, we heard arguments on defendants' motions. At the hearing, the federal defendants submitted a proposed order similar to plaintiff's suggested revision. We then asked the parties to confer and attempt to agree on a draft order. Plaintiff and the federal defendants now offer such an order but disagree on the interpretation of one of its provisions. Mountain States does not join in presenting this order but renews its earlier objections to the issuance of any injunction. We will discuss the various motions pending as well as detail our intention with respect to certain provisions of the new order.

### *Discussion*

#### *1. Motions for Reconsideration*

At the outset we deny the federal defendants' request for reconsideration of our issuance of the preliminary injunction. They offer no new points in opposition, and we continue to adhere to our reasoning as set out in the December 4, 1985 Memorandum Opinion. Mountain States, on the other hand, does introduce several new arguments, which we will now address separately.

#### *A. Lack of Injury to Plaintiff*

Mountain States claims that since the lands at issue were subject to certain commercial exploitation even before defendants' classification terminations and withdrawal revocations, NWF can prove no injury.<sup>1</sup> It contends, in essence, that once commercial development was authorized, there could be no further injury to the environmental and aesthetic interests of plaintiff's members. This generalization sweeps too broadly. It fails to distinguish among types of commercial development. The fact that land was previously open to activities such as "dam construction, airports, hydroelectric power sites, and military reservations and target ranges," Mtn. States Reply at 3, hardly eliminates injury when the land is later made available for strip mining. Similarly, there is injury to plaintiff's members ability to use land, once open only to mineral leasing, that becomes subject, through operation of the mining laws, to fee interest transfer. Mountain States has not shown that the prior commercial uses of the lands are identical to those allowed since the withdrawals were revoked and the classifications terminated. We con-

<sup>1</sup> This contention, while challenging our jurisdiction to grant equitable relief, raises the issue of plaintiff's standing to sue.

tinue to find irreparable injury to plaintiff and reaffirm plaintiff's standing to bring this action.

### B. Exhaustion

Mountain States also raises, for the first time, a claim that this court may not review plaintiff's claims since NWF has not exhausted its administrative remedies. Mountain States concedes that the withdrawal decisions represent final agency actions. Reply at 8 n. 5. Thus, its exhaustion argument can focus only on the classification terminations.

Neither the Federal Land Policy and Management Act, 13 U.S.C. §§ 1701, *et seq.* (FLPMA), nor the applicable regulations foreclose this court's review of defendants' actions. The statute itself imposes no exhaustion requirement,<sup>2</sup> and in fact emphasizes Congress' desire to provide for judicial review of public land adjudication decisions. 43 U.S.C. § 1701(a)(6). Similarly, the regulations appear to vest a right of appeals only in an individual "party" to a discrete classification termination case. 43 C.F.R. § 4.410(a) (1984). NWF was not a "party" to any of defendants' termination decisions.

Mountain States argues that the regulations pertaining specifically to land classifications establish a right—and a duty—to seek administrative review. The regulations provide that classifications may be "changed" using specified procedures, 43 C.F.R. § 2461.4, which include a sixty-day delay after publication of the proposed classification, § 2461.2, and a thirty-day period after final publication for administrative review. § 2461.3. However, the pro-

<sup>2</sup> Mountain States alleges that 43 U.S.C. § 1704 mandates application of the review mechanism of the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* Reply at 10. We have read Title 43 but do not find a § 1704.

cedures of Subpart 2461 relate only to the process of classifying public lands. They do not appear to address actions *terminating* such classifications. We do not share Mountain States' confidence that "changing" classifications necessarily includes terminating them. Furthermore, the government never published its proposed decisions, as required by 43 C.F.R. § 2461.2. Pl.Opp. to Mtn. States Motion at 7. It would be anomalous to impose a rigid exhaustion requirement on plaintiff where defendants have not followed or attempted to follow their own procedures.<sup>3</sup>

We note further that mere publication in the *Federal Register* may not alert even the most careful reader that defendants' classification terminations should inspire protest. As plaintiff noted earlier, the notices in the *Federal Register* do not indicate "whether environmental impact statements were prepared, whether land use plans supported the action, or whether the action had been sent to the President and Congress for review." Pl. Reply to Def. Opp. to Pl. Motion for Prelim. Inj. at 13. Unlike most challenges to agency action, plaintiff's complaint raises concerns which the agency's notice, on its face, may not have triggered or aroused.

Even if the regulations normally require administrative review, we do not feel that in the factual context of this case any exhaustion rule limits our jurisdiction. Exhaustion is a flexible requirement, one tailored to "an understanding of its purposes and of the particular administrative scheme involved." *McKart v. United States*, 395 U.S. 185, 193, 89 S.Ct. 1657, 1662, 23 L.Ed.2d 194 (1969); *accord Etelson v. Office of Personnel Management*, 684

<sup>3</sup> This failure to publish proposed termination actions also undermines Mountain States' reliance on 43 C.F.R. §§ 4.450 and 2450.4(a), since both sections assume that action has first been "proposed."

F.2d 918, 923 (D.C.Cir.1982). As the Supreme Court has observed, the requirement of exhaustion allows the agency the opportunity to make a factual record, to exercise its discretion or to apply its expertise. It permits the agency to discover and correct its own errors. It prevents deliberate flouting of administrative processes. Finally, it avoids the necessity of premature judicial intervention. *McKart*, 395 U.S. at 194-95, 89 S.Ct. at 1662-63.

None of the underlying purposes of exhaustion apply here. The essence of plaintiff's claim is legal: the exercise of agency discretion and expertise and the development of a factual record would not be helpful or necessary to decide this legal issue. Plaintiff's unsuccessful attempts earlier to encourage defendants to reverse their present policies, the government's commitment to these policies as revealed in its vigorous defense, and the magnitude of decisions involved all indicate the futility of further administrative efforts and the inevitability of recourse to the courts. Finally, plaintiff's attempts to present its claims to the government through various means, Pl. Opp. at 8, demonstrate that while plaintiff did not seek full-scale administrative review, it did not "flout" the administrative process.

Thus finding that plaintiff need not have pursued administrative review and that an exhaustion prerequisite would serve no benefit here, we hold that plaintiff may seek judicial review.

### C. Certification of the Joinder Question Under 28 U.S.C.

Mountain States urges us either to reconsider our denial of its motion to dismiss for failure to join indispensable [*sic*] parties or to certify the issue to the Court of Appeals under 28 U.S.C. § 1292(b). We recognize Mountain

States' legitimate concern for the interests of the absent parties. However, we see no reason to reverse our original ruling. The effective result of preventing plaintiff from litigating its claims were we to require joinder and the "public rights" exception to normal joinder rules combine to reinforce our holding that the absent parties are not "indispensable [*sic*]."

Further, we decline to certify the issue under § 1292(b). The statute permits certification when, on issuing an order, the district judge "shall be of the opinion that such an order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." To begin with, we do not believe there is "substantial ground for difference of opinion" with our conclusion that joinder here is unnecessary. This case clearly fits the doctrine of the "public rights" exception, as established by the Supreme Court in *National Licorice Co. v. NLRB*, 309 U.S. 350, 60 S.Ct. 569, 84 L.Ed.799 (1940), and developed in subsequent cases. Contrary to Mountain States' assertion, the potential adverse effect on the absent parties does not reflect a novel application of the doctrine. See, e.g., *Jeffries v. Georgia Residential Finance Authority*, 678 F.2d 919 (11th Cir.1982), *cert. denied*, 459 U.S. 971, 103 S.Ct. 302, 74 L.Ed.2d 283 (1982); *Swomley v. Watt*, 526 F.Supp. 1271 (D.D.C.1981); *Natural Resources Defense Council v. Berklund*, 458 F.Supp. 925 (D.D.C.1978), *aff'd*, 609 F.2d 553 (D.C.Cir.1979).

Mountain States argues that the "public rights" exception does not justify nonjoinder where plaintiff's requested relief would not just harm but would "invalidate the property rights" of the absent parties. Memo. in Support of Motion for Reconsideration at 30. Plaintiff, however, does not request direct cancellation of any property

rights. It seeks compliance with certain statutes and regulations. Other courts have applied the "public rights" exception where a plaintiff seeks similar compliance with the law, even though the immediate effect of plaintiff's request would be harm to third parties. See *NRDC v. Berklund*, 458 F.Supp. 925<sup>4</sup>; *State of Delaware v. Bender*, 370 F.Supp. 1193 (D.Del.1974).

This case typifies a "public rights" proceeding. Plaintiff seeks to protect and enforce the public's right to full compliance with the laws governing management of the public lands. The fact that Mountain States claims also to represent an alternative public interest does not weaken the force of the "public rights" doctrine in this case. See *Sierra Club v. Watt*, 608 F.Supp. 305, 325 (E.D.Cal.1985) (opponents of public interest plaintiffs included a public interest group with a viewpoint different from the plaintiffs'). In *Sierra Club*, several environmental organizations and the State of California challenged, *inter alia*, the Secretary of the Interior's exclusion of lands less than 5,000 acres from wilderness study area status. In holding that the "public interest" exception justified nonjoinder of the owners of mineral rights in those lands, the court concluded "[w]hatever the outer boundaries of the public interest exception, the instant case falls within the heart of it." 608 F.Supp. at 325. We believe that the facts of this

<sup>4</sup> Mountain States attempts to distinguish *NRDC v. Berklund* on the ground that the relief eventually *provided* merely delayed the issuance of coal leases. Yet in discussing the joinder problem earlier in the opinion, Judge Green gave no indication that she was not considering the full relief plaintiff there sought, which included enjoining defendants from issuing the leases without recognizing the Secretary's discretion to reject lease applications on environmental grounds and without preparing an environmental impact statement.

case parallel those of *Sierra Club* and that this case also "falls within the heart" of the "public interest" exception.<sup>5</sup>

Furthermore, an immediate appeal of the joinder issue is not likely to "materially advance the ultimate termination of the litigation." Today we reissue the preliminary injunction. Plaintiff, through its motion to consolidate, has evidenced its readiness to proceed to the permanent injunction proceeding. While defendants oppose this motion, we do not believe that final adjudication in this court represents a distant hope. An interlocutory appeal to the Court of Appeals, whose own over-loaded docket precludes early resolution, would not "materially" advance termination of this case.

Having denied both motions for reconsideration of the preliminary injunction, we now turn to the order itself.

## II. Preliminary Injunction Order

The preliminary injunction order accompanies this opinion. We here highlight certain aspects of that order.

First, the preliminary injunction order enjoins only the federal defendants. Third parties are not subject to its prohibitions.

Second, we do not intend by this order to overturn or in any way to upset fee interests. Parties, such as Summit County School District, we understand, which have fee interests in the lands at issue in this case are not affected by the preliminary injunction.

<sup>5</sup> *Naartex Consulting Corp. v. Watt*, 722 F.2d 779 (D.C.Cir.1983), cited by Mountain States, sheds no light on the present case. In *Naartex*, the plaintiff was seeking directly to cancel a contract involving the absent parties. Furthermore, it was suing on behalf of its own interests in obtaining the contract; it did not raise the issue of the public interest.

Third, while the order specifically protects state selection and conveyance rights of the State of Alaska, the conveyance rights of Alaska natives, the continued construction of the All American Pipeline, and transactions or activity by Summit County School District [*sic*]. These are limited exclusions. Other third parties are not encouraged to seek exemption. We believe that Alaska, All American and the School District would be able to continue with their present plans regardless of the provisions in the order that mention them. In other words, these parties are already exempted under the general terms of the order. We name them merely out of an abundance of caution to emphasize that the injunction does not affect them.

Fourth, paragraph 3(a) refers to filing required to be made by holders of existing mining claims in order to preserve their claims. See 43 C.F.R. § 3833.2-1. It does not permit defendants to authorize mining activity.

Finally, the injunction prohibits the federal defendants from taking any action inconsistent with the specific restrictions of the withdrawals and classifications in effect on January 1, 1981. Thus, activities that would have been permitted on the affected public lands under the previous withdrawals or classifications prior to revocation or termination, may still take place.

The parties focus on this issue with respect to lands classified for multiple use management under the Classification and Multiple Use Act of 1964 (CMUA), 78 Stat. 986 (1964). In particular, they disagree over whether such lands would nonetheless be subject to "disposal." The CMUA required the Secretary of the Interior to classify the public lands for either "disposal" or "multiple use management." Although the Act expired in 1970, the savings provision in the FLPMA extended all existing classifications "until modified under the provisions of this Act, or other applicable laws." 43 U.S.C. § 1701. In challeng-

ing classification terminations, plaintiff ultimately seeks to reinstate prior classifications, developed pursuant to the CMUA, until defendants comply with their statutory obligations. Thus, the parties' dispute necessitates analysis of the classification scheme that the CMUA established.

We agree with plaintiff that the statute itself does not contemplate *disposals* of land when classified for multiple use management. The CMUA equates management for multiple use with *retention*. It commands the Secretary to decide "which lands shall be classified for disposal and which lands he considers to contain such values as to make them more suitable for retention in Federal ownership for interim management. . . ." 78 Stat. 986, § 1(b). The legislative history confirms this dichotomy between classifications for disposal on the one hand and classifications for retention under principles of multiple use management on the other. See S.Rep. No. 1506, 88th Cong., 2d Sess. at 2, *reprinted in* 1964 U.S. Code Cong. & Ad. News 3755, 3756 (Secretary to classify public lands "into at least two broad groups: those subject to disposal and those subject to retention").

In arguing that § 7 of the statute weakens this dichotomy, defendants read too much into the phrase "in accordance with this Act." We disagree that § 7 "obviously" allows the Secretary still to dispose of lands regardless of their classification. We read this provision as merely emphasizing that once the Secretary has classified lands for disposal "in accordance with this Act," nothing in the statute further hampers his power to effectuate the disposals.

By way of further elaboration, the applicable regulations on their face do not contradict the statutory distinction between retention for multiple use management and disposal. To begin with, the regulations also link multiple use management classifications with retention. See *e.g.*, 43

C.F.R. § 2400.0-2 ("retention and management"); § 2400.0-3(j) ("(1) sold . . . or (2) retained, at least for the time being, in Federal ownership and managed. . . ."); § 2429.2 ("Lands may be classified for retention . . . if they are not suitable for disposal. . . ."). Furthermore, the segregation provisions can be read to harmonize with this two-part framework. Defendants stress the provision keeping open classified public lands to "as many forms of disposal as possible consistent with the purposes of the classification and the resource values of the land." 43 C.F.R. § 2440.2. Defendants suggest that land classified for multiple use management need not be segregated from all forms of disposal and that disposal is proper under such a classification.

This argument, which we suspect reflects much of plaintiff's concern, assumes that "disposal" is necessarily inconsistent with retention in federal ownership. However, the regulations reveal that the term "disposal" covers more than sale or other methods of relinquishing title. A lease, for example, also represents a form of disposal. See 43 C.F.R. § 2440.1 ("settlement, location, sale, selection, entry, lease, *or other forms of disposal*" (emphasis added)). A lease might be "consistent with the purposes" of a particular classification for retention for multiple use management. A sale would not. Section 2440.2 thus may simply allow some forms of "disposal" on retained lands which do not undermine Federal ownership.

Similarly, § 2440.3(b) does not necessarily demonstrate that lands classified for multiple use management may be "conveyed out of Federal ownership." Mtn. States Br. at 4-5. The fact that these lands would still be subject to mining "location" does not show that they are also subject to the entire sequence under the mining laws that leads from location to fee ownership. This provision in the regulations weighs only the public interest in the "search" for

mineral deposits. It says nothing about private acquisition of property rights.

Although we disagree with defendants' interpretation of the statute and regulations, we are bound by the terms of the individual classifications defendants have created. Plaintiffs have brought this suit to reverse classification terminations. They have never challenged the terms of the original classifications. In fact, they seek to reinstate the classifications that existed on January 1, 1981. These pre-1981 classifications all outlined their particular segregative effect pursuant to 43 C.F.R. § 2440.1. In some cases the segregation was complete. See Mtn. States Ex. A, New Mexico 7633. In others, the segregation provision kept the land open to all forms of "appropriation" except those under enumerated statutes. See Mtn. States Ex. A, Montana 944785. It is not clear whether the permissible forms of appropriation included sales or other conveyances of title. However, that issue is irrelevant in the present case. Plaintiffs have asked us to nullify classification terminations since 1981 pending defendants' compliance with the applicable statutes. Plaintiff requests reinstatement, not review. Our order therefore enjoins defendants from "taking any action inconsistent with the *specific* restrictions of a withdrawal or classification in effect on January 1, 1981." (emphasis added). If the specific restrictions of a particular classification condoned some form of "disposal," the terms of the classification again apply.

### III. Motion to Consolidate

Plaintiff's motion, filed shortly before the hearing, is now moot. We intend to allow the parties to present their respective cases at a permanent injunction hearing to be held as soon as possible. The attached preliminary injunc-

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tion order sets a status call to determine the schedule for remaining discovery and any motions that will follow.

Orders consistent with this opinion have been entered this day.

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**APPENDIX G**

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

No. 88-5397

NATIONAL WILDLIFE FEDERATION, APPELLANT

v.

ROBERT F. BURFORD, ET AL.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLUMBIA

---

[Filed June 20, 1989]

---

BEFORE: Edwards and Ruth B. Ginsburg, Circuit  
Judges, and Kaufman\*, Senior District Judge

**JUDGMENT**

This cause came on to be heard on the record on appeal from the United States District of Columbia and was argued by counsel. On consideration thereof, it is

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\* of the United States District Court for the District of Maryland, sitting by designation pursuant to 28 U.S.C. § 294(d).

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded for further proceedings, in accordance with the Opinion for the Court filed herein this date.

*Per Curiam*  
FOR THE COURT:

/s/ Constance L. Dupre  
CONSTANCE L. DUPRE, Clerk

Date: June 20, 1989  
Opinion for the Court filed by Circuit Judge Edwards

## APPENDIX H

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 88-5291

NATIONAL WILDLIFE FEDERATION

v.

ROBERT F. BURFORD, ET AL.

ASARCO INCORPORATED,  
APPLICANT FOR INTERVENTION, APPELLANT

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLUMBIA

---

[Filed June 20, 1989]

---

BEFORE: Edwards and Ruth B. Ginsburg, Circuit  
Judges, and Kaufman\*, Senior District Judge

## JUDGMENT

This cause came on to be heard on the record on appeal from the United States District of Columbia and was argued by counsel. On consideration thereof, it is

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\* of the United States District Court for the District of Maryland, sitting by designation pursuant to 28 U.S.C. § 294(d).

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded for further proceedings, in accordance with the Opinion for the Court filed herein this date.

*Per Curiam*  
FOR THE COURT:

/s/ Constance L. Dupre  
CONSTANCE L. DUPRE, Clerk

Date: June 20, 1989  
Opinion for the Court filed by Circuit Judge Edwards

## APPENDIX I-1

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 88-5397

NATIONAL WILDLIFE FEDERATION, APPELLANT

v.

ROBERT F. BURFORD, ET AL.

---

[Filed Dec. 20, 1988]

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BEFORE: Starr, Williams and Sentelle, Circuit Judges

## ORDER

Upon consideration of appellant's emergency motion for restoration of injunction pending appeal, the oppositions and reply, appellant's motion for summary reversal, the oppositions and reply, and the federal appellees' motion to file an over-sized opposition and the opposition, it is

ORDERED that federal appellees' motion to file an over-sized opposition be granted. The Clerk is directed to file the federal appellees' opposition to the motion for summary reversal. It is

FURTHER ORDERED that restoration of the injunction pending appeal be denied. Appellant has not met the standards necessary for injunctive relief pending appeal.

*See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *D.C. Circuit Handbook of Practice and Internal Procedures* 38 (1987). On the present record, we see no indication that there is any specific area with respect to which the probability of irreparable harm to appellant is great enough to merit an injunction. Therefore, an injunction pending appeal is not warranted. It is

FURTHER ORDERED that the motion for summary reversal be denied. Summary disposition is inappropriate in this case because the merits of the parties' positions are not so clear as to justify expedited action. *See Sills v. Bureau of Prisons*, 761 F.2d 792 (D.C. Cir. 1985); *Ambach v. Bell*, 686 F.2d 974 (D.C. Cir. 1982) (per curiam). It is

FURTHER ORDERED, on the court's own motion, that this appeal be expedited. The court will hear oral argument on March 20, 1988. A briefing order will follow shortly.

PER CURIAM

APPENDIX I-2

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

[Filed Dec. 8, 1988]

ORDER

Upon consideration of plaintiff's Motion for Restoration of the Injunction Pending Appeal, the opposition thereto, and the entire record herein, it is by the Court this 7th day of December, 1988

ORDERED that plaintiff's motion is hereby denied.

/s/ John H. Pratt

JOHN H. PRATT

United States District Judge

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**APPENDIX I-3**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

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[Filed Nov. 4, 1988]

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**ORDER**

Upon consideration of the parties' respective motions for summary judgment and oppositions thereto, the hearing thereon held July 22, 1988, and the parties' subsequent submissions on the issue of plaintiff's standing, it is by the Court this 4th day of November, 1988

ORDERED that this Court's grant of a preliminary injunction be vacated, and it is

ORDERED that Defendants' Motion for Summary Judgment be granted; and it is

FURTHER ORDERED that the above action shall stand dismissed for lack of standing.

/s/ John H. Pratt  
JOHN H. PRATT  
United States District Judge

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**APPENDIX I-4**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

---

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

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[Filed July 22, 1988]

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**ORDER**

Presently before us is Asarco Incorporated's (Asarco's) Motion to Intervene into this longstanding litigation. Upon consideration of Asarco's motion, the briefs filed by the parties and the record as a whole, and in light of our determination *[sic]* that Asarco's application for intervention is not timely, as required by Rule 24 of the Federal Rules of Civil Procedure, it is by the court this 22nd day of July, 1988

ORDERED that Asarco *[sic]* motion to intervene by *[sic]* denied.

/s/ John H. Pratt  
JOHN H. PRATT  
United States District Judge

## APPENDIX I-5

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

[Filed Apr. 8, 1988]

## ORDER

Upon consideration of defendant's Motion to Amend our Order of February 10, 1986, as amended by our Order of November 25, 1986, the lack of opposition thereto, and the record as a whole, it is by the court this 8th day of April, 1988

ORDERED that defendants' motion is granted; and it is FURTHER ORDERED that subparagraph (f) of paragraph 3 of our Order of February 10, 1986, as amended by our Order of November 25, 1986, is further amended to read:

(3) Nothing in this Order shall be construed to prohibit or affect:

f) the Secretary of the Interior or his designee(s) from complying with the statutory obligations im-

posed on him by Sec. 3 of Pub. L. No. 99-542 (October 27, 1986), Sec. 104 of Pub. L. No. 99-950 [sic] (October 30, 1986), Sections 4(a), 4(b), 6 and 7 of Pub. L. No. 99-632 (Nov. 7, 1986), Section 12(h) of Pub. L. No. 99-606 (Nov. 6, 1986) and the last two unnumbered paragraphs under the heading of "Administrative Provisions" in that portion of House Joint Resolution 395, Pub. L. No. 100-202, containing the 1988 Fiscal Year Appropriations for the Bureau of Land Management.

/s/ J. H. Pratt

JOHN H. PRATT

United States District Judge

## APPENDIX I-6

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

[Filed Jan. 6, 1987]

## MEMORANDUM ORDER

Defendant intervenor, The Department of Water and Power of the City of Los Angeles, (LADWP) seeks a declaration that a congressionally approved land exchange between the Department of the Interior and the City of Los Angeles involving federal lands at Haiwee Reservoir in Inyo County, California and the City's Upper Franklin Reservoir property (Haiwee/Franklin Exchange) is not within the scope of this Court's order of February 10, 1986, or alternatively, an amendment to that order which would exempt this land exchange.<sup>1</sup>

<sup>1</sup> LADWP also moves for a similar ruling concerning certain geothermal leases authorized by the Geothermal Steam Act of 1970. On December 31, 1986, we granted a motion by California Energy Company on the same grounds proposed by LADWP. By separate

In 1984, the National Parks and Recreation Act of 1978 (Public Law 95-625), which created the Santa Monica National Recreation Area, was amended specifically to authorize the Haiwee Franklin exchange between the Department of Interior's Bureau of Land Management (BLM) and the City of Los Angeles for the purposes of the Santa Monica Mountains National Recreation Area. See 16 U.S.C. § 460kk(c)(2)(B). Under the exchange, the Recreation Area, a 150,000 acre unit of the National Park System, would acquire thirty acres of property owned by the City of Los Angeles, including Upper Franklin Reservoir. See LADWP's Memo. at 24. In return, the BLM would convey to the City of Los Angeles certain lands managed by the BLM in the vicinity of the Haiwee Reservoir in Inyo County. 16 U.S.C. § 460kk(c)(2)(B). On June 11, 1986, the exchange had not been consummated and LADWP requested BLM to complete the land exchange. On July 30, 1986, the BLM denied the request on the ground that as of January 1, 1981, the lands to be conveyed by the BLM had been withdrawn, and that in order to complete the exchange, it was necessary to revoke or modify this withdrawal, which BLM could not do. Ex. 8, LADWP's Memo. We agree with the BLM.

Under paragraph 1(b) of the preliminary injunction of February 10, 1986, the Department of Interior is enjoined from "taking any action inconsistent with the specific restrictions of a withdrawal or classification in effect on January 1, 1981 . . . ." While the order disclaims an intention to disturb any transfers of land in fee, it is clear, despite LADWP's contention, that this Haiwee/Franklin exchange was still in the negotiation stage and that no fee

order today, we grant LADWP's motion regarding their geothermal leases on Naval Weapons Testing Center lands within the Coso Known Geothermal Resource Area, Inyo County, California.

interest had been conveyed prior to January 1, 1981. This holding avoids piecemeal adjudication and is consistent with our prior actions regarding the Trust of Public Land and Sunlight Development Company. As for LADWP's remaining contentions, *i.e.*, plaintiff's lack of standing and failure to show irreparable injury, these cannot now be decided on the present record but must await the disposition of pending motions.

Accordingly, it is by the court this 6th day of January, 1987

ORDERED that LADWP's motion for declaratory and other relief regarding the Haiwee/Franklin land exchange is denied.

/s/ J.H. Pratt  
JOHN H. PRATT  
United States District Judge

**APPENDIX I-7**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

[Filed Jan. 6, 1987]

**ORDER**

Upon consideration of the motion of Department of Water and Power for the City of Los Angeles, California for relief from preliminary injunction, the supporting memorandums and exhibits submitted and the entire record herein, and it appearing to the court that continued development of the geothermal operations of the Department of Water and Power for the City of Los Angeles on Navel Weapons Testing Center lands within the Coso Known Geothermal Resource Area, Inyo County, California, are not enjoined or otherwise subject to the preliminary injunction entered in this action, it is by the court this 6th day of January, 1987,

ORDERED that the preliminary injunction entered on December 4, 1985, as amended on February 10, 1986, does

not apply to the geothermal operations of the Department of Water and Power for the City of Los Angeles on Naval Weapons Center lands within the Coso Known Geothermal Resource Area, Inyo County, California, and it is

FURTHER ORDERED that The Bureau of Land Management shall forthwith vacate and set aside its suspension order of April 22, 1986, which order directed that the City of Los Angeles cease all proposed and future geothermal operations on the Naval Weapons Testing Center land.

/s/ J.H. Pratt

JOHN H. PRATT

United States District Judge

**APPENDIX I-8**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

**ORDER**

Upon consideration of motion of California Energy Company Inc. ("Cal Energy") and the County of Inyo, California, for relief from preliminary injunction, the memorandum of points and authorities and affidavits and exhibits submitted in support thereof, and the memoranda of points and authorities filed by the plaintiff, the federal defendants and the defendant-intervenor, and it appearing to the court that continued development of the geothermal operations of Cal Energy on Naval Weapons Testing Center lands within the Coso Known Geothermal Resource Area, Inyo County, California, are not enjoined or otherwise subject to the preliminary injunction entered in this action, it is hereby

ORDERED and DECLARED that

(1) The preliminary injunction entered on December 4, 1985, as amended on February 10, 1986, does not apply to the geothermal operations of California Energy Com-

pany, Inc. on Naval Weapons Center lands within the Coso Known Geothermal Resource Area, Inyo County, California, and it is

FURTHER ORDERED that

The Bureau of Land Management shall forthwith vacate and set aside its suspension order of 22 April 1986, directing that Cal Energy cease all proposed and future geothermal operations.

/s/ J.H. Pratt

J.H. PRATT

Judge

Signed this 31st day of December, 1986.

**APPENDIX I-9**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

[Filed Nov. 25, 1986]

**ORDER**

Upon consideration of the November 24, 1986 motion of the defendants to amend this court's order of February 10, 1986, the court noting that the motion is unopposed and being of the opinion that the motion should be granted, it is hereby *ordered* that this court's order of February 10, 1986 is amended to add a new subparagraph (f) to paragraph 3 of that order as follows:

(f) the Secretary of the Interior or his designee(s) from complying with the statutory obligations imposed on him by Sec. 3 of Pub. L. No. 99-542 (Oct. 27, 1986), Sec. 104 of Pub. L. No. 99-590 (Oct. 30, 1986), Sections 4(a), 4(b), 6, and 7 of Pub. L. No. 99-632 (Nov. 7, 1986) and Section 12(h) of Pub. L. No. 99-606 (Nov. 6, 1986).

Dated this 25th day of November 1986.

/s/ J.H. Pratt

JOHN H. PRATT

United States District Judge

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**APPENDIX I-10**

**THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

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[Filed July 14, 1986]

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**ORDER**

Upon consideration of plaintiff National Wildlife Federation's motion to quash and for a protective order and defendants' opposition thereto, it is by the court this 11th day of July, 1986,

ORDERED that plaintiff's motion is granted; and it is further

ORDERED that the subpoenas of Kathleen C. Zimmerman and Lynn Greenwalt and any other subpoenas which may have been served upon plaintiff National Wildlife Federation, its members, employees, officers, agents, servants, or attorneys are hereby quashed, and the notices of deposition are vacated; and it is further

ORDERED that no further discovery of plaintiff or its members, officers, employees, agents, servants, or at-

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torneys shall be permitted until subsequent order of this court, if any.

/s/ J.H. Pratt

JOHN H. PRATT

United States District Judge

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APPENDIX I-11

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

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[Filed May 22, 1986]

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ORDER

Upon consideration of the motions by the defendants and defendants-intervenors Mountain States Legal Foundation for a stay of the preliminary injunction pending appeal, plaintiff's opposition, and Mountain States Legal Foundation's reply; and, in accordance with the standard set out in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977), finding that defendants-appellants are not likely to prevail on the merits, that while defendants or third parties may be harmed by the injunction, a stay would irreparably harm the plaintiff, and that the public interest favors the continued enforcement of the injunction, it is by the court this 21st day of May, 1986,

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ORDERED that the motions for a stay of the preliminary injunction are hereby denied.

/s/ J.H. Pratt

JOHN H. PRATT

United States District Judge

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**APPENDIX I-12**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

---

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, DONALD P. HODEL, AND THE UNITED  
STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS,

AND

MOUNTAIN STATES LEGAL FOUNDATION, A NONPROFIT  
COLORADO CORPORATION, ON BEHALF OF NAMED AND  
UNNAMED MEMBERS AND THE MINERALS EXPLORATION  
COALITION, INC., A NONPROFIT COLORADO CORPORATION,  
ON BEHALF OF NAMED AND UNNAMED MEMBERS,  
DEFENDANT-INTERVENORS.

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[Filed May 5, 1986]

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**ORDER**

Upon consideration of Plaintiff's motion to voluntarily dismiss, the Court finds that Plaintiff's action is inappropriate for voluntary dismissal under Fed. R. Civ. P. 41(a) as to the tract of public lands to be exchanged by the

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United States Forest Service to the Sunlight Development Company, it is therefore

**ORDERED** that Plaintiff's motion for voluntary dismissal is denied.

Signed this 30th day of April, 1986.

/s/ J.H. Pratt

JOHN H. PRATT

United States District Judge

## APPENDIX I-13

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

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[Filed Mar. 6, 1986]

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**ORDER**

Upon consideration of the motion of the Trust for Public Land to intervene in this action as a defendant, the statement of points and authorities submitted in support thereof, and the memorandum in response submitted by plaintiff, it is hereby

ORDERED, that the motion to intervene is granted pursuant to Fed. R. Civ. P. 24(b)(2) for the limited purpose of determining whether the Trust for Public Land's proposed land exchange with the United States Forest Service is prohibited under the terms of this Court's Order of February 10, 1986; and it is further

ORDERED that the federal defendants' issuance of a patent with respect to the Trust for Public Land's ex-

change is not exempt under the terms of the Court's Order of February 10, 1986.

Signed this 6th day of March, 1986.

/s/ J.H. Pratt

J.H. PRATT

United States District Judge

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**APPENDIX I-14**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

---

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

---

[Filed Feb. 10, 1986]

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**ORDER**

Upon consideration of the motions by the federal defendants and by defendant-intervenor Mountain States Legal Foundation for reconsideration and the motion by Mountain States Legal Foundation to amend the judgment to certify the issue of joinder to the Court of Appeals, and for reasons set out in the accompanying opinion, it is by the court this 10th day of February, 1986,

ORDERED that the motions are all denied.

/s/ J.H. Pratt

JOHN H. PRATT

United States District Judge

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**APPENDIX I-15**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

---

[Filed Feb. 10, 1986]

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**ORDER**

Upon consideration of plaintiff's motion for a preliminary injunction, defendants' opposition and plaintiff's reply, and

Finding that a preliminary injunction is necessary to preserve the relative positions of the parties until this case can be decided on the merits, and further

Finding that the plaintiff has shown a substantial likelihood of success on the merits, and further

Finding that plaintiff will suffer irreparable harm if the requested injunction is not issued, and further

Finding that issuance of the requested injunction would serve the public interest, it is by the court this 10th day of February, 1986,

ORDERED that plaintiff's motion for a preliminary injunction is granted, and it is

ORDERED that

(1) Defendants, their officers, agents, servants, employees, and attorneys and those persons in active concert or participation with them are hereby enjoined from:

(a) modifying, terminating or revoking, in full or in part, under the Federal Land Policy and Management Act (FLPMA), any withdrawal or classification that was in effect on January 1, 1981; or

(b) taking any action inconsistent with the specific restrictions of a withdrawal or classification in effect on January 1, 1981, including, but not limited to, the issuance of leases, the sale, exchange or disposal of land or interests in land, the granting of rights-of-way, or the approval of any plan of operations;

(2) Terminations or modifications under the FLPMA of classifications and revocations or modifications under the FLPMA of withdrawals occurring since January 1, 1981, are hereby suspended until further action by this court;

(3) Nothing in this order shall be construed to prohibit or affect:

(a) The acceptance by the Department of the Interior of filings required to be made by Federal law;

(b) State selection and conveyance rights afforded to the State of Alaska by § 906 of the Alaska National Interest Lands Conservation Act, 94 Stat. 2371, or

(c) Native conveyance rights afforded to Alaskan natives by the Alaska Native Claims Settlement Act, 85 Stat. 688, and the Alaska National Interest Lands Conservation Act, 94 Stat. 2371;

(d) The construction of the All American Pipeline project pursuant to a right-of-way grant issued by the Bureau of Land Management on May 17, 1985;

(e) Any transactions or other activity on the Frisco Administrative Site No. 2 S1/2SE1/4, Section 26, Township 5 South, Range 78 West of the Sixth Principal Meridian in Summit County, Colorado.

(4) Defendants shall forthwith cause a copy of this order to be published in the *Federal Register* and posted and made available to the public in defendants' offices in any State where this order might affect any person.

(5) Pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, plaintiff shall post security for this injunction in the amount of one hundred dollars (\$100.00).

(6) Nothing in this order shall be construed to affect any party's right to appeal this order.

(7) This preliminary injunction shall take effect upon publication in the *Federal Register* or on the fifth day after this order is filed, whichever day occurs sooner, and it is

FURTHER ORDERED that the parties shall appear for a status call on February 19, 1986 at 9:30 a.m., Courtroom No. 12, United States Courthouse.

/s/ J.H. Pratt

JOHN H. PRATT

United States District Judge

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**APPENDIX I-16**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

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[Filed Dec. 4, 1985]

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**ORDER**

Upon consideration of the motion to intervene of Chairman John F. Seiberling of the House Committee on Public Lands, the response thereto, and the record herein, it is by the court this 4th day of December, 1985,

ORDERED that the motion to intervene of Congressman Seiberling be and the same hereby is granted.

/s/ J.H. Pratt

JOHN H. PRATT

United States District Judge

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**APPENDIX I-17**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

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[Filed Dec. 4, 1985]

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**ORDER**

Upon consideration of defendants' motion to dismiss for failure to join indispensable parties and for lack of standing, plaintiff's opposition and defendants' reply and upon hearing the parties on September 16, 1985, it is by the court this 4th day of December, 1985,

ORDERED that defendants' motion to dismiss is hereby denied.

/s/ J.H. Pratt

JOHN H. PRATT

United States District Judge

## APPENDIX I-18

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

[Filed Dec. 4, 1985]

## ORDER

Upon consideration of plaintiff's motion for a preliminary injunction, defendants' opposition thereto and plaintiff's reply, and

Finding that a preliminary injunction is necessary to preserve the relative positions of the parties until this case can be decided on the merits, and further

Finding that the plaintiff has shown a substantial likelihood of success on the merits, and further

Finding that plaintiff will suffer irreparable harm if the requested injunction is not issued, and further

Finding that issuance of the requested injunction would serve the public interest, it is by the court this 4th day of December, 1985

ORDERED that plaintiff's motion for a preliminary injunction is granted, and it is

ORDERED that as used in this order, the terms "public lands" and "withdrawal" shall have the meaning given them by the Federal Land Policy and Management Act, 43 U.S.C. § 1702(e), (j), and it is

ORDERED that the defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them are hereby enjoined from:

1. Modifying, terminating or altering any withdrawal, classification, or other designation governing the protection of lands in the public domain that was in effect on January 1, 1981, or

2. Taking any action inconsistent with any withdrawal, classification, or other designation governing the protection of lands in the public domain that was in effect on January 1, 1981, including, but not limited to, the issuance of leases, the sale, exchange or disposal of land or interests in land, the grant of rights-of-way, or the approval of any plan of operations; and it is

ORDERED that all persons holding interests, including but not limited to, ownership, possession, mining claims and their development, leases and rights-of-way, in lands that were the subject of classification terminations or withdrawal revocations since January 1, 1981 are hereby enjoined from taking any action inconsistent with the present status quo of these lands, including but not limited to, the staking of additional mining claims, obtaining new leases, mining, timber removal, land clearing, construction, or other forms of development; and it is

ORDERED that the defendants shall forthwith cause a copy of this order to be published in the *Federal Register* and posted and made available to the public in defendants' offices in any state where this order might affect any person; and it is

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ORDERED that pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, plaintiff shall post security for this injunction in the amount of one hundred (\$100.00) dollars, and it is

FURTHER ORDERED that a status call is scheduled for Monday, January 6, 1986 at 9:30 a.m., Courtroom No. 12, United States Courthouse.

/s/ J.H. Pratt  
JOHN H. PRATT  
United States District Judge

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**APPENDIX I-19**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

---

**AFFIDAVIT OF RICHARD LOREN ERMAN**

I, Richard Loren Erman, being duly sworn and under penalty of perjury, based upon personal knowledge of the following facts as specifically appears herein, deposes and says:

1. I am a member of the National Wildlife Federation (NWF) and its affiliate the Arizona Wildlife Federation.

2. I reside at 3435 East Windrose Drive, Phoenix, Arizona 85032.

3. I use the federal lands, including those in the vicinity of the Grand Canyon National Park, the Arizona Strip (Kanab Plateau), and the Kaibab National Forest for recreational purposes and for aesthetic enjoyment.

4. My recreational use and aesthetic enjoyment of these lands depends upon their management and enhancement by the Bureau of Land Management and the United States Department of the Interior. Therefore, I am particularly concerned about the compliance of these agencies with

laws pertaining to the preservation, protection, and enhancement of the federal lands and resources they administer. I am also interested in participating in their decisions affecting these lands. For example, I assisted in the preparation of comments submitted by the Arizona Wildlife Federation on the Tonto National Forest Land Management Plan, the Coconino National Forest Land Management Plan, and the Bureau's Lower Gila Resource Management Plan.

5. I am aware that the National Wildlife Federation has filed a lawsuit against the Bureau of Land Management (Bureau) and the Department of the Interior (Department) for unlawfully terminating protective land use classifications and other withdrawals on federal lands pursuant to their Land Withdrawal Review Program.

6. My recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of Grand Canyon National Park and the Arizona Strip have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department. In particular, the Arizona Strip has been opened to the staking of mining claims, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands.

7. My interest in seeing that the laws pertaining to the preservation, protection, and enhancement of federal lands and their natural resources are complied with has been adversely affected by the unlawful actions of the Bureau and the Department.

8. My interest in participating in decisions affecting the preservation, protection, and enhancement of federal lands and their natural resources has been adversely affected by the failure of the Bureau and the Department to provide notice of their proposals to terminate classifica-

tions and other withdrawals and to provide opportunities for public involvement in the development and execution of the Land Withdrawal Review Program.

9. Given my recreational use and aesthetic enjoyment of the federal lands and their natural resources, my concern in ensuring that the laws pertaining to their preservation, protection, and enhancement are enforced, and my interest in participating in decisions affecting their future management, my interests are being fully and adequately represented by NWF in its lawsuit against the Bureau and the Department and my interests will be fairly redressed by a decision favorable to NWF.

/s/ RICHARD L. ERMAN

Richard L. Erman

Subscribed and sworn to before me  
this day of April, 1986.

/s/ Cecilia M. Perz

Notary Public

My commission expires on October 26, 1966.

## APPENDIX I-20

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

## AFFIDAVIT OF PEGGY KAY PETERSON

I, Peggy Kay Peterson, being duly sworn and under penalty of perjury, based upon personal knowledge of the following facts as specifically appears herein, deposes and says:

1. I am a member of the National Wildlife Federation (NWF) and its affiliate the Wyoming Wildlife Federation.

2. I reside at 3519 Partridge Lane, Casper Wyoming 82604.

3. I use the federal lands, including those in the vicinity of the South Pass-Green Mountain area of Wyoming for recreational purposes and for aesthetic enjoyment.

4. My recreational use and aesthetic enjoyment of these lands depends upon their management and enhancement by the Bureau of Land Management and the United States Department of the Interior. Therefore, I am particularly concerned about the compliance of these agencies with laws pertaining to the preservation and protection of the

federal lands they administer. I am also interested in participating in their decisions affecting these lands. For example, I assisted in the preparation of comments submitted by the Wyoming Wildlife Federation on the Bureau's Draft Lander Resource Management Plan.

5. I am aware that the National Wildlife Federation has filed a lawsuit against the Bureau of Land Management (Bureau) and the Department of the Interior (Department) for unlawfully terminating protective land use classifications and other withdrawals on federal lands pursuant to their Land Withdrawal Review Program.

6. My recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of South Pass-Green Mountain, Wyoming have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department. In particular, the South Pass-Green Mountain area of Wyoming has been opened to the staking of mining claims and oil and gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands.

7. My interest in seeing that the laws pertaining to the preservation and protection of federal lands and their natural resources are complied with has been adversely affected by the unlawful actions of the Bureau and the Department.

8. My interest in participating in decisions affecting the preservation and protection of federal lands has been adversely affected by the failure of the Bureau and the Department to provide notice of their proposals to terminate classifications and other withdrawals and to provide opportunities for public involvement in the development and execution of the Land Withdrawal Review Program.

9. Given my recreational use and aesthetic enjoyment of the federal lands, my concern in ensuring that the laws

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pertaining to their preservation and protection are enforced, and my interest in participating in decisions affecting their future management, my interests are being fully and adequately represented by NWF in its lawsuit against the Bureau and the Department and my interests will be fairly redressed by a decision favorable to NWF.

- /s/ PEGGY KAY PETERSON  
Peggy Kay Peterson

Subscribed and sworn to before me  
this 7th day of April, 1986.

/s/ Connie L. Maves  
Notary Public

My commission expires on March 29, 1988.

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**APPENDIX I-21**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF,

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS.

**DECLARATION OF LYNN A. GREENWALT**

1. Lynn A. Greenwalt, am the Vice President for Resources Conservation of the National Wildlife Federation (NWF). In that capacity, I am directly responsible for supervising all of the advocacy and litigation activities of NWF.

2. NWF is the largest, non-governmental conservation/education organization in the United States with over 4.5 million members and supporters and 51 affiliate organizations. Many of these members use the federal lands for recreational purposes and for aesthetic enjoyment.

3. NWF is dedicated to the conservation and wise use of the nation's natural resources. To that end, NWF maintains an active education program to inform its members and the general public about conservation issues, including natural resource management on federal lands. For example, in 1985, NWF published a report on the con-

dition of public rangelands. NWF's members have contributed financially to the organization, in part, so that they may obtain information on conservation issues.

4. NWF also represents its membership in advocating improvements in federal and state statutes, regulations, and procedures pertaining to the protection and enhancement of federal lands. For example, NWF supported passage of the Federal Land Policy and Management Act. Since the enactment of these laws, NWF's professional staff has represented its membership by monitoring the implementation of these laws and in ensuring that related federal and state environmental laws are properly interpreted, implemented, and enforced. NWF members have contributed financially to the organization, in part, so that they may obtain adequate representation of their legally-protected environmental interests, which representation they may not otherwise individually obtain.

5. NWF's ability to meet these obligations to its members has been significantly impaired by the failure of the Bureau of Land Management and the Department of the Interior to provide adequate information and opportunities for public participation with respect to the Land Withdrawal Review Program. These interests of NWF have been injured by the actions of the Bureau and the Department and would be irreparably harmed by the continued failure to provide meaningful opportunities for public input and access to information regarding the Land Withdrawal Review Program. The interests of NWF will be addressed by a decision favorable to NWF in this lawsuit.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 16th day of May, 1986.

/s/ LYNN A. GREENWALT

Lynn A. Greenwalt

DEC 8 1989

JOSEPH F. SPANIOL, JR.  
CLERK

In The  
**Supreme Court of the United States**

October Term, 1989

MOUNTAIN STATES LEGAL FOUNDATION, ET AL.,

*Petitioners,*

v.

NATIONAL WILDLIFE FEDERATION,

*Respondent.*

MANUEL LUJAN, JR., SECRETARY  
OF THE INTERIOR, ET AL.,

*Petitioners.*

v.

NATIONAL WILDLIFE FEDERATION,

*Respondent.*

**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The District of Columbia Circuit**

**BRIEF IN OPPOSITION FOR RESPONDENT  
NATIONAL WILDLIFE FEDERATION**

KATHLEEN C. ZIMMERMAN  
NORMAN L. DEAN, JR.\*  
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*Attorneys for Respondent  
National Wildlife Federation*

\*Counsel of Record

**QUESTION PRESENTED**

1. Whether individuals who use federal lands for recreational purposes, and whose use and enjoyment of those lands will be adversely affected as a direct result of a government program or policy, have standing to challenge that program or policy?

## PARTIES

Respondent National Wildlife Federation\* accepts the Secretary of the Interior's list of all parties to the proceeding below.

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\* The National Wildlife Federation (NWF) is a non-profit corporation incorporated in the District of Columbia. It has no parent companies, subsidiaries, or affiliates in which any outside persons or investors might have an interest. NWF has two "subsidiaries:" National Wildlife Federation Endowment, Inc. and Wildlife Publications, Inc., both based in Washington, D.C. NWF also holds a majority interest in DeSoto Greetings, Inc., a Maryland corporation. NWF has fifty-two "affiliates," one in each state, as well as the Virgin Islands and Puerto Rico. Each affiliate is a non-profit environmental/conservation organization.

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## STATEMENT OF THE CASE

This action challenges specific violations of applicable federal statutes in the formulation and implementation of the Department of the Interior's (Department's) ongoing "Land Withdrawal Review Program" (Program) under which land withdrawals and classifications have been terminated. Withdrawals and classifications are two mechanisms used by the Department to protect federal lands against unwise or premature disposition and development. Classifications and withdrawals act to protect federal lands from disposal under the agricultural laws (*i.e.*, homestead, desert land entry, and Indian allotment), from sale, from exchange, from mineral leasing, and from location under federal mining laws. The underlying purpose of classifications and withdrawals is to limit private activities on federal lands in order to maintain the public values of these lands, including recreation and fish and wildlife.<sup>1</sup>

The Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 *et seq.* (1982), enacted in 1976,

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<sup>1</sup> Contrary to the assertions of petitioners, withdrawals and classifications do not mandate any affirmative duty on the part of the Department. Petitioners, therefore, mislead the Court when they suggest that the mere existence of a power site withdrawal in the Grand Canyon requires the construction of a dam. Secretary of the Interior's Petition for a Writ of Certiorari [hereinafter Gov. Br.] at 7. The withdrawals at issue in Arizona were executed in the early 1900's yet the Colorado River still flows freely through the Grand Canyon. What petitioners fail to mention is that the revocation of these withdrawals opened lands immediately adjacent to Grand Canyon National Park to private mineral development.

contains specific provisions governing the disposition of classifications and withdrawals. *See, e.g.*, 43 U.S.C. §§ 1712(d), 1714(l). In addition, the savings provision of FLPMA, Pub. L. No. 94-579, 90 Stat. 2743, provides in Section 701(c) that "[a]ll withdrawals, reservations, classifications, and designations in effect as of the date of the approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law."

Between FLPMA's enactment in 1976 and 1980, the Department engaged primarily in completing an inventory of withdrawn or classified lands. Affidavit 1B of Frank Edwards ¶ 24. In 1981, however, under the direction of the new Secretary of the Interior, James G. Watt, the Department put in motion a comprehensive program to terminate withdrawals and classifications and to open as much land as possible to commercial uses:

One of the Administration's goals is to build the United States strategic minerals stockpile. An important means to attaining this goal is to open "locked-up" Federal land to mineral exploration and development through aggressive pursuit of the withdrawal review program . . . .

Letter to Secretary of Energy James B. Edwards from Secretary of the Interior James G. Watt (July 13, 1982) (Plaintiff's Exhibit No. 70). New instructions were issued to the field offices that withdrawals were to be eliminated as quickly as possible:

Since the first of the year, substantial shifts in program emphasis and direction have occurred. More precise priorities have been established; specific production commitments required of the State Offices.

The new administration has stated clearly its objective to eliminate all unnecessary withdrawals of federal lands, opening as many acres as possible to the operation of the mining and mineral leasing laws.

Memorandum to the Acting Director of the Bureau of Land Management from the Assistant Director for Lands and Rights-of-Way (February 20, 1981) (Plaintiff's Exhibit No. 73). Terminations of classifications and withdrawals subsequently proceeded rapidly under the Program. By mid-1985, the Department had terminated protective classifications and withdrawals for approximately 180 million acres of public land. Affidavit of James Parker ¶ 35; Affidavit 1A of Frank Edwards ¶ 25 (Joint Appendix filed in the court of appeals [hereinafter J.A.] 71).

The Program has opened many areas to commercial development, particularly mineral exploitation, that have important recreational, environmental, or other public values - public values that may well be sacrificed as a result of the Department's actions.<sup>2</sup> As the court of appeals noted, changed uses, particularly the opening of

<sup>2</sup> For example, the Department terminated a reclamation withdrawal covering 34,285 acres in Utah, opening 8,360 acres to the operation of the mining laws, 46 Fed. Reg. 7348 (January 23, 1981), despite the prospect that placer mining in the area would have an adverse impact on two endangered species of fish, as well as potential impacts on endangered bald eagles and peregrine falcons. In addition, campgrounds and other recreational sites have been opened to mining and mineral leasing. *See, e.g.*, 47 Fed. Reg. 11671 (March 18, 1982); 49 Fed. Reg. 32808 (August 16, 1984).

lands to mineral exploitation, can destroy fragile natural resources, as well as the use of natural areas for aesthetic and recreational purposes. (Appendix to the Secretary's Petition for a Writ of Certiorari [hereinafter Gov. App.] 78a-79a).

In July 1985, respondent, the National Wildlife Federation (NWF), filed suit challenging the Program. In its complaint for declaratory and injunctive relief, NWF alleged that the Department's wholesale termination of these protective withdrawals and classifications violated a number of specific provisions of federal law, including FLPMA, the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* (1982), and the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* (1982). In its request for relief, NWF sought, among other things, the completion of a programmatic environmental impact statement (EIS), the promulgation of regulations governing the Program, adequate opportunities for public participation in the Program and its activities, and the submission of proposed actions to the Congress for review. Amended Complaint at 16 (J.A. 37).

Simultaneously with the filing of its complaint, NWF moved for a preliminary injunction. Federal defendants responded by filing a motion to dismiss Count II of the complaint on the ground that NWF lacked standing to raise the Department's failure to submit its withdrawal recommendations to Congress.<sup>3</sup> United States Representative John F. Seiberling then moved to intervene on

<sup>3</sup> NWF claimed in Count II that the Department was in violation of Section 204(1) of FLPMA, 43 U.S.C. § 1714(1), by terminating classifications and withdrawals in eleven western states without prior submission of a recommendation to the President or to Congress.

Count II. The district court granted the intervention of Congressman Seiberling, confirmed his standing as well as that of NWF,<sup>4</sup> and issued a preliminary injunction after finding that NWF was likely to succeed on the merits of at least two of its claims and would be irreparably harmed in the absence of interim relief. (Gov. App. 130a).

Defendant-intervenor Mountain States Legal Foundation (Mountain States) sought reconsideration of the district court's preliminary injunction order arguing that NWF could prove no injury to either itself or its members. The district court rejected Mountain States' claims noting that "[t]his question, while challenging our jurisdiction to grant equitable relief, raises the issue of plaintiff's standing to sue," (Gov. App. 139a), and went on to hold that "[w]e continue to find irreparable injury to plaintiff and reaffirm plaintiff's standing to bring this action," (*id.* at 139a-40a).

In anticipation of filing for summary judgment, NWF submitted affidavits in support of the standing allegations of its complaint. In both its original and its amended complaint, NWF stated that it has over 4.5 million members, many of whom "use and enjoy the environmental resources that will be adversely affected by the challenged actions." Amended Complaint ¶¶ 5, 6 (J.A. 24-25). As examples of the injuries actually suffered

<sup>4</sup> Upon Mr. Seiberling's retirement from the Congress, the district court ordered the substitution of Congressman Bruce F. Vento, who succeeded Seiberling as Chairman of the Subcommittee on National Parks and Public Lands, and reaffirmed his standing. Order (June 2, 1987) (J.A. 251).

by its members, NWF submitted the affidavits of Peggy Kay Peterson and Richard Loren Erman.

Ms. Peterson lives in Casper, Wyoming and recreates on the federal lands in the South Pass/Green Mountain area of Wyoming. Affidavit of Peggy Kay Peterson (April 7, 1986) ¶¶ 2, 3 (Gov. App. 1901a). She states that her "recreational use and aesthetic enjoyment" of the lands she uses will be adversely affected by the decision to open them "to the staking of mining claims and oil and gas leasing" and that mining or oil and gas development "threatens the aesthetic beauty and wildlife habitat potential of these lands." *Id.* at ¶¶ 6, 7 (Gov. App. 191a). It is undisputed that on May 10, 1984, the Department terminated classification order no. W-6228 and opened 4,455.06 acres of land in the South Pass/Green Mountain area of Wyoming to the operation of the mining law. 49 Fed. Reg. 19904 (May 10, 1984).

The injury to Ms. Peterson's continued use and enjoyment of these lands as a direct result of terminating this classification is corroborated by the Department's own documents. The Department's records reveal that on the day the lands were opened, 199 mining claims were staked. Prior to the imposition of the district court's preliminary injunction, 406 mining claims had been staked on these lands and four mines began operations. Exhibit 9C to Edwards Affidavit 1C (J.A. 118). Government counsel concedes that additional mineral development on these South Pass/Green Mountain lands is imminent. Transcript of Hearing (July 22, 1988)

[hereinafter Transcript] at 58 (J.A. 310).<sup>5</sup> The draft resource management plan prepared for this area by the Department in 1986 acknowledges that:

[i]n the Green Mountain Management Unit, uranium exploration and development might cause significant losses of crucial winter and winter/yearly elk and muledeer ranges and in trout habitat in the Willowcreek and Cottonwood Creek drainages over the longterm. Elk and trout populations may be lost entirely.

Department of the Interior, Draft Lander Resource Management Plan/EIS (1986) at 228 (Plaintiff's Exhibit No. 61).

Richard Loren Erman lives in Phoenix, Arizona and recreates on federal lands near the Grand Canyon National Park, the Arizona Strip, and the Kaibab National Forest. Affidavit of Richard Loren Erman (April 1986) ¶¶ 2, 3 (Gov. App. 187a). He specifically states that his recreational use and aesthetic enjoyment of lands in the Arizona Strip are adversely affected by the decision of the Department to open the lands to the staking of mining claims. *Id.* at ¶ 6 (Gov. App. 188a). Although the Department contends that the land is of little mineral value, 669 mining claims have been staked on these lands since they were opened and one notice of operations has been filed. Exhibit 11A to Edwards Affidavit 1A (J.A. 84). The patenting of these claims will result in the permanent

<sup>5</sup> Ms. Peterson and NWF learned during the summer of 1988 that U.S. Energy Corporation plans to develop yet another uranium mine, in part on lands previously closed to mining by classification order no. W-6228. Declaration of Peggy Kay Peterson (August 28, 1988) ¶ 7.

loss of these lands to public recreational use, including that of Mr. Erman.

NWF's complaint also alleged that it is injured as an organization by its inability: 1) to obtain information on the Department's Program and the actions completed under its aegis; and 2) to participate in the Department's decisionmaking.<sup>6</sup> Amended Complaint ¶ 6 (J.A. 24-25). In support of these allegations, NWF submitted the sworn declaration of its then Vice President for Resources Conservation Lynn A. Greenwalt. According to Mr. Greenwalt, NWF has been denied the "opportunity to see and use" the kind of information that would have been available had the Department completed EISs on the Program and the actions completed under its aegis. Declaration of Lynn A. Greenwalt (May 16, 1986) ¶¶ 2-5 (Gov. App. 193a-94a). Mr. Greenwalt also attests that, as a result, NWF's ability to fulfill its obligations to its members who "have contributed financially to the organization, in part, so that they may obtain adequate representation of their legally-protected environmental interests" has been damaged. *Id.* at ¶ 4 (Gov. App. 194a).

On June 17, 1986, federal defendants served subpoenas on NWF seeking to take fifteen depositions in eleven western states and the District of Columbia.<sup>7</sup> The

<sup>6</sup> FLPMA specifically requires public participation in the land management decisions of the Department. *See, e.g.*, 43 U.S.C. §§ 1712(f), 1739(e).

<sup>7</sup> The Secretary's statement of the case indicates that these subpoenas were served following the court of appeals' decision sustaining the preliminary injunction. Gov. Br. at 11-12. This is incorrect.

admitted purpose of these depositions was to demonstrate that NWF could not prove standing to bring this action. NWF moved for a protective order, arguing that it had already produced the affidavits of Ms. Peterson, Mr. Erman, and Mr. Greenwalt proving its standing; and, therefore, additional discovery as to this issue would be unreasonably cumulative within the meaning of Fed. R. Civ. P. 26(c)(1). The district court agreed and issued the requested protective order. (Gov. App. 170a).

NWF moved for summary judgment on June 23, 1986. In their cross-motion, federal defendants again raised the standing of NWF and Mountain States filed yet another motion to dismiss NWF's claims. No defendant challenged the standing of the congressional intervenor.

In December 1987, the court of appeals sustained the district court's preliminary injunction. (Gov. App. at 38a). The majority opinion specifically held that NWF had standing to proceed. (*Id.* at 56a). In his opinion concurring on standing, Judge Williams applied the circuit's criteria for proof of standing on summary judgment as set forth in *Wilderness Society v. Griles*, 824 F.2d 4 (D.C. Cir. 1987), and concluded that:

the issue of standing is largely academic . . . By the time the case was submitted to this court, the defendants appear to have conceded the bare minimum necessary for standing.

(Gov. App. 85a). The court of appeals denied defendants' petitions for rehearing. (*Id.* at 116a).

Six months after the preliminary injunction was upheld and nearly two years after the motions had been filed, the district court heard oral argument on summary

judgment. At the close of argument on the motions, the district court ordered the case submitted except as to standing and requested additional memoranda from both sides on that issue. Order (July 28, 1988) (J.A. 345). In compliance with the district court's directive, NWF filed a memorandum on its standing that included five supplemental declarations. These declarations are by members of NWF who use federal lands that have been affected by the Program and whose continued use and enjoyment of those lands are threatened by the Department's actions. (Respondent's Appendix [hereinafter R.A.]).

David Doran recreates quite extensively on the federal lands near Coos Bay, Oregon. On April 24, 1984, the Department terminated two protective withdrawals and opened 1500 acres of land on which Mr. Doran recreates to disposal under the public land laws. Declaration of David Doran, ¶ 8 (R.A. 2); 49 Fed. Reg. 17502 (April 24, 1984). The Department proposes to dispose of these lands for the "development of a marine industrial park." Affidavit of Joseph J. Martyak, December 16, 1985, ¶ 24(a) (J.A. 146-47). As a result, lands which currently provide habitat for the endangered snowy plover and peregrine falcon, and birdwatching opportunities for Mr. Doran, will be cleared and paved. Declaration of David Doran ¶ 5 (R.A. 2).

Merlin McColm resides in Elko, Nevada and uses many of the public lands in Nevada for recreation. Areas adjacent to the Roberts and Tuscarora Mountains frequented by Mr. McColm have been opened to mining and other forms of development by the Department. Declaration of Merlin McColm, ¶ 7 (R.A. 5); see also 47 Fed. Reg. 6851 (February 17, 1982); 47 Fed. Reg. 7236 (February 18,

1982). He has already observed the ecological damage stemming from these actions in the form of "sedimentation from mining runoff and direct habitat destruction." *Id.*<sup>8</sup>

Stephen Blomeke is an avid hunter and travels "considerable distances across the state of Colorado to access areas containing prime habitat" for game species. Declaration of Stephen Blomeke, ¶ 5 (R.A. 8). In doing so, he uses numerous federal campgrounds and recreation areas. *Id.* Pursuant to the Department's Program, many of these public areas have been opened to disposal and development. *Id.* at ¶¶ 8-10 (R.A. 8-9); see also 47 Fed. Reg. 7414-423 (February 19, 1982). Prior to the issuance of the injunction in this case, twenty-five mining claims already had been staked on campgrounds frequented by Mr. Blomeke. Exhibit 11A to Edwards Affidavit 1A (J.A. 86).

Will Ouellette lives in rural New Mexico and uses the federal lands in the surrounding countryside on a daily basis. Declaration of A.L. Ouellette, ¶¶ 1-5 (R.A. 11-12). Many of the areas he uses, including the Tent Rocks Recreation Area, have been opened to disposal and development by the termination of protective land classifications. *Id.* at ¶ 9 (R.A. 12-13). The Tent Rocks area of New Mexico is a unique environment. "Comparable formations are found only in Turkey." Bureau of Land Management, *Draft Rio*

<sup>8</sup> According to federal defendants' own submissions, three mining claims have been staked on 80 acres previously protected by these withdrawals. Exhibit 11A to Edwards Affidavit 1A (J.A. 89). All three were staked the year the lands were opened. *Id.* No mining claims were staked the previous two years. *Id.*

*Puerco Resource Management Plan and Environmental Impact Statement* at C-30 (1985) (attached as Appendix III to Declaration of A.L. Ouellette). Yet, the Department terminated the classifications that protected these lands for public enjoyment and recreation, to the detriment of Mr. Ouellette as well as many others.

In addition, Ms. Peterson supplemented her earlier affidavit. In her supplemental declaration, she identifies in detail the challenged actions responsible for her injury and provides an example of a specific proposal to develop a uranium mine on lands which previously had provided Ms. Peterson with undisturbed wildlife habitats for hiking, camping, hunting, and fishing. (R.A. 16).

In their responsive memoranda, defendants produced no evidence to contradict the statements in these supplemental declarations.

The district court summarily rejected NWF's supplemental declarations as untimely and "violative of its order;" reversed its previous rulings on NWF's standing; dismissed the entire case, including the unheard claims of Congressman Vento; and dissolved the preliminary injunction.

At this point, NWF appealed. A three-judge panel of the court of appeals unanimously reversed the holding of the district court on three separate grounds:

(1) that the affidavits submitted by NWF in support of its motion for summary judgment "clearly alleged facts showing that its members were 'among the persons injured' by [the Department of the] Interior," (Gov. App. 15a);

(2) that since these same affidavits had provided "adequate grounds for NWF to establish irreparable harm" for a preliminary injunction, they also demonstrated sufficient injury-in-fact to support the test of standing, and the court of appeals' previous opinion upholding the preliminary injunction was law of the case on this issue, (*id.* at 19a); and

(3) that the equities of this case "unquestionably compel an allowance" on the part of NWF to supplement the record to cure any alleged defects on standing, and that NWF's supplemental declarations "easily satisfy the level of specificity needed for standing under any of the Supreme Court's articulated tests," (*id.* at 21a).

The court of appeals then remanded the case for disposition on the merits. Because it directed the district court to address NWF's substantive claims "with dispatch," the court of appeals did not reinstate the preliminary injunction. (*Id.* at 25a).

The petitions for *certiorari* filed by the Secretary and Mountain States seek review of this decision.

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## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any federal court of appeals. Indeed, the Secretary alleges no such conflict. Moreover, the issues raised by petitioners are not of such exceptional importance as to justify review by this Court, especially in light of the essentially factual character of the petitioners' questions for review. Accordingly, a writ of *certiorari* is unwarranted.

**I. THE DECISION OF THE COURT OF APPEALS IS CORRECT AND IS CONSISTENT WITH THIS COURT'S REQUIREMENTS FOR FEDERAL STANDING.**

In two separate opinions, unanimous panels of the court of appeals determined that NWF has standing to pursue this litigation. This holding does not represent a departure from existing standing law but rather falls squarely within its tenets. Indeed, petitioners do not charge that the holding in this case conflicts with the decision of another court of appeals; nor can they point to a divergence from controlling Supreme Court precedent.

**A. The Court of Appeals' Decision is Consistent with Prior Supreme Court Precedent**

This Court summarized the constitutional requirements of standing in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), as follows:

at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41, (1976).

*Id.* at 472. It is the first of these thresholds, or the "injury-in-fact" requirement, that is at issue in the instant case.

(Gov. App. 12a). Following the guidance of the Court's prior opinions, that injury must be "distinct and palpable," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), yet it need not be great; an "identifiable trifle" will suffice, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973); and standing extends to those who show some type of environmental injury, *id.* at 686; see also *Japan Whaling Association v. American Cetacean Soc.*, 478 U.S. 221, 231 n.4 (1986).

The requirements for establishing standing in cases involving such environmental injury are well-settled. Thus, in *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972), this Court denied standing to the Sierra Club on its allegation that the government's decision to permit development in a national park would "destroy or . . . adversely affect" the natural resources in the park and would "impair . . . enjoyment . . . for future generations." The Court acknowledged that this was a cognizable injury but found that it did not amount to injury-in-fact sufficient to uphold standing because the Sierra Club had "failed to allege that it or its members would be affected in any of their activities or pastimes by the . . . development." *Id.* at 734-35. In *SCRAP*, however, the Court found that the plaintiff organizations had alleged sufficient injury to establish standing to challenge an ICC rate increase. The plaintiffs in *SCRAP* asserted that their members used "the forests, rivers, streams, mountains, and other natural resources in the Washington Metropolitan area" for various recreational and aesthetic purposes and that these uses would be adversely affected by the challenged conduct. *SCRAP*, 412 U.S. at 678.

In the instant case, NWF alleged in its complaint that its members "use and enjoy the environmental resources that will be adversely affected" by the challenged Program. Amended Complaint ¶ 6 (J.A. 25). As evidence in support of these allegations, NWF initially submitted the affidavits of Ms. Peterson and Mr. Erman. Both Ms. Peterson and Mr. Erman, as members of NWF, state that their "recreational use and aesthetic enjoyment" of particular federal lands will be adversely affected by the decision to open them "to the staking of mining claims and oil and gas leasing" and that mining or oil and gas development "threatens the aesthetic beauty and wildlife habitat potential of these lands." (Gov. App. 187a-92a). Their affidavits use the phrase "in the vicinity" to describe in lay terms the location of the tracts at issue.<sup>9</sup> Both Ms.

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<sup>9</sup> There is no evidence in the record to support the Secretary's claims that the area of land in the vicinity of South Pass/Green Mountain, Wyoming on which Ms. Peterson states she recreates constitutes over two million acres. Gov. Br. at 20. Ms. Peterson's affidavit contains no such statement. The Department's own documents describe the federal land holdings in South Pass and Green Mountain as 14,000 and 126,000 acres, respectively. Department of the Interior, Draft Lander Resource Management Plan/EIS (1986). Ms. Peterson specifically limits her injury only to those unique tracts of federal land within South Pass/Green Mountain that have been opened to mining and mineral leasing by the Department. Affidavit of Peggy Kay Peterson at ¶ 6 (Gov. App. 191a).

The five million acre figure for Mr. Erman's recreational use in the Arizona Strip is also a gross exaggeration. Gov. Br. at 9. Mr. Erman's affidavit contains no such figure and neither does the affidavit of G. William Lamb on which the Secretary relies.

Peterson and Mr. Erman specifically state that they are injured by the opening of lands they use to private mineral development.<sup>10</sup>

The Secretary's attempt to distinguish *SCRAP* is unavailing. Gov. Br. at 20. Like the instant case, *SCRAP* was a challenge to government action with nationwide effects. Standing to challenge an ICC freight rate increase was founded upon individual allegations of use of the natural resources in the Washington metropolitan area. Similarly, NWF's complaint alleges use of environmental resources placed at risk by government action and NWF's affidavits provide direct evidence of the use of threatened natural areas by its members.

The court of appeals correctly interpreted Ms. Peterson's affidavit to demonstrate that NWF's "members were 'among the persons injured' " by the Department's challenged actions. (Gov. App. 15a). The court of appeals did not, as the Secretary suggests, "presume" that a "mere claim of standing necessarily implies a factual basis to support it." Gov. Br. at 21. Indeed, drawing on *dicta* in this Court's *SCRAP* decision, the District of Columbia Circuit has adopted a stringent standard for proof of standing at the summary judgment stage. *Wilderness Society v. Griles*, 824 F.2d at 16. To accomplish the required showing, NWF had to: (1) identify lands that are

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<sup>10</sup> If there was any doubt that Ms. Peterson uses lands actually affected by the Department's Program to terminate classifications and withdrawals, it was resolved by her supplemental declaration in which Ms. Peterson identifies the precise classification terminations that will impair her use of federal lands. Declaration of Peggy Kay Peterson ¶ 7-9 (R.A. 16-17).

affected by the challenged government action; (2) demonstrate that third parties are likely to respond to that government action with development activities; and (3) identify members in specific areas that would suffer an adverse impact from such third-party conduct. *Id.* at 10-12. The court of appeals reviewed the evidence contained in Ms. Peterson's affidavit, as well as other evidence in the record, and drew the only logical inference available to it, *i.e.*, that Ms. Peterson, in fact, is injured by the Department's actions.

Having determined that Ms. Peterson's affidavit was sufficient to demonstrate NWF's standing, the court of appeals declined to address the affidavit of Mr. Erman.<sup>11</sup> (Gov. App. 18a). It summarily reaffirmed its prior rejection of the argument raised by Mountain States below, and resurrected by the Secretary in his petition, that NWF must prove that it is injured by each action completed under the auspices of the Program and on every acre of federal land affected in order to challenge the Program itself. (*Id.* at 16a). The court of appeals based its rejection of this argument upon controlling precedents of this Court set forth in *International Union, United Automobile,*

<sup>11</sup> The court of appeals also declined to discuss the injury to the organization itself described in Mr. Greenwalt's declaration. This Court's recent opinion in *Public Citizen v. U.S. Department of Justice*, 109 S. Ct. 2558, 2563-64 (1989), however, specifically recognizes that the denial of information or lawful participation constitutes injury for purposes of standing. Mr. Greenwalt's declaration establishes that NWF has been injured by the denial of the kind of information normally included in EISs prepared under NEPA. (Gov. App. 194a).

*Aerospace and Agricultural Implement Workers of America v. Brock*, 477 U.S. 274 (1986), and *Warth v. Seldin*, 422 U.S. 490.<sup>12</sup> (Gov. App. 55a).

In sum, there is no important question of federal law at issue in this case that requires the intercession of the Supreme Court. The Secretary's petition reduces to a dispute over the court of appeals' interpretation of Ms. Peterson's original affidavit. According to the Secretary, neither Ms. Peterson nor Mr. Erman claim to use lands actually affected by the challenged Program, only lands "in the vicinity" and the court of appeals, therefore, misinterpreted Ms. Peterson's original affidavit. Gov. Br. at 20. Under any circumstances, this alleged misreading of Ms. Peterson's affidavit would rarely warrant the scrutiny of the Supreme Court.<sup>13</sup> In light of the clarification

<sup>12</sup> In the *International Union* case, for example, the plaintiff labor union gained standing to challenge the Department of Labor's nationwide policy regarding eligibility for unemployment benefits on the basis of injury to any one of the union's members. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock*, 477 U.S. at 281-91.

<sup>13</sup> This is particularly so since, in order to review this dispute, the Court will have to wade through the evidence presented by both sides and determine the factual content of NWF's affidavits and exhibits as well as those submitted by defendants. Moreover, in considering this question on summary judgment, the Court must, first, believe NWF's evidence and, second, resolve all justifiable inferences in NWF's favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). Even read in a manner exceedingly favorable to defendants and unaided by Ms. Peterson's supplemental declaration, the phrase "in the vicinity of" is, at most, ambiguous on the issue of whether Ms.

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provided by Ms. Peterson herself in her supplemental declaration, however, the Secretary's assertions are singularly undeserving of the Court's attention. In her supplemental declaration, Ms. Peterson identifies the precise actions by the Department that will impact her use of federal lands by opening them to mining. She also identifies a specific proposal to "mine a significant portion of the federal lands which I use for recreational purposes and for aesthetic enjoyment." Declaration of Peggy Kay Peterson ¶ 7-9 (R.A. 16-17). The court of appeals' conclusion that Ms. Peterson, in fact, is injured by the actions of the Department is inescapable upon a cursory reading of this declaration.

#### **B. The Court of Appeals' Decision to Permit Supplementation of the Record is Correct**

As the court of appeals noted, "[n]o party to this litigation seriously disputes that NWF's supplemental affidavits, if considered, easily satisfy the level of specificity needed for standing under any of the Supreme Court's articulated tests." (Gov. App. 21a). Instead, the Secretary asks the Court to place an embargo on any

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Peterson's recreational use extends to lands affected by the challenged actions. Given the presumptions established by the summary judgment rules, this ambiguity must be resolved in favor of Ms. Peterson and NWF. *Id.*

The instant case is not comparable to *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In *Celotex*, the plaintiff offered no evidence whatsoever in opposition to the defendants' motion for summary judgment. In contrast, NWF submitted several member affidavits, as well as the Department's own documents, *see* discussion *supra* pp. 6-7, in support of its standing. NWF also proffered additional evidence.

supplementation of the factual record on standing in a case which has not yet gone to trial.<sup>14</sup> Such a holding would be inconsistent with prior Supreme Court precedent. This Court repeatedly has remanded cases to permit supplementation of the factual allegations in support of standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377-78 (1982); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 55 n.6 (1976); *Warth v. Seldin*, 422 U.S. at 501-02; *Sierra Club v. Morton*, 405 U.S. at 735 n.8.

It would also be wasteful of judicial resources to require the dismissal and re-filing of cases involving curable jurisdictional defects. *See Costello v. United States*, 365 U.S. 265 (1961). The Department's Program is ongoing. NWF can re-file its complaint and cure any alleged deficiency on standing by submitting evidence of the continuing injury its members and the organization suffer as the result of the Department's actions.

Moreover, to dismiss the instant case on the basis of such a ruling would be a gross injustice. Prior to its order

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<sup>14</sup> The Secretary's argument that any supplementation of the record is improper is founded on a narrow reading of Fed. R. Civ. P. 56(c) requiring the service of summary judgment materials "prior to the day of the hearing." Yet, defendants were permitted to introduce new evidence concerning the substantive merits of their case at oral argument, in violation of the strict letter of Fed. R. Civ. P. 56(c). Transcript at 55-56, 92. (J.A. 307-08, 344). NWF should have been afforded an opportunity to respond.

Moreover, the district court requested additional submissions from both sides on the standing issue only after oral argument.

dismissing the case, the district court previously issued three orders upholding NWF's standing. No one challenged the standing of NWF's co-plaintiff in the case, Congressman Bruce F. Vento.<sup>15</sup> The court of appeals sustained the issuance of a preliminary injunction holding that NWF had proved irreparable harm to its members. (Gov. App. 78a). The court of appeals unanimously upheld NWF's standing to bring the suit. Defendants did not seek review of that decision. No change in either the factual situation or this Court's dispositions on standing was brought to the attention of the district court. In short, NWF had no reason to believe that its standing was still at issue until suddenly, at the close of oral argument on cross-motions for summary judgment, the district court indicated that it wanted additional submissions on standing. (Gov. App. 20a). In response to the court's request, NWF submitted a memorandum with supporting declarations. Defendants had a full opportunity to refute the evidence in those declarations. (*Id.* at 21a). Under these rather unusual circumstances, the court of appeals properly found that the district court should have permitted NWF to submit additional evidence in support of standing prior to dismissing the case for lack of jurisdiction. On the basis of these supplemental declarations, NWF's standing is irrefutable.

<sup>15</sup> NWF's co-plaintiff, Congressman Bruce F. Vento did not join in NWF's motion for summary judgment and his standing was not addressed in the district court's opinion dismissing the case. If Mr. Vento has standing to pursue this litigation, then a separate basis for NWF's standing is unnecessary. *Watt v. Energy Action Education Foundation*, 454 U.S. 151, 160 (1981). The district court upheld the Congressman's standing twice prior to dismissing the case. See discussion *supra* pp. 4-5.

## II. FEDERAL PROGRAMS ARE NOT IMMUNE TO CHALLENGE IN THE COURTS

Both petitioners contend that the Department's actions at issue in this case are somehow insulated from judicial review. The Secretary suggests that the court of appeals' grant of standing in this case violates the separation of powers clause of the Constitution, but he cites no caselaw to support this theory.<sup>16</sup> *Mountain States*, citing *Ashwander v. TVA*, 297 U.S. 288 (1936), and *Allen v. Wright*, 468 U.S. 737 (1984), alleges that this Court has precluded challenges to government programs or policies, including NWF's challenge to the Department's Land Withdrawal Review Program. Both arguments are untenable. They cannot be reconciled with this Court's prior decisions on standing.

### A. The Court of Appeals' Standing Decision Does Not Violate the Separation of Powers Clause

The Secretary contends that this litigation will necessarily transform a single district court judge into a "national land use czar," Gov. Br. at 22; and, therefore, standing to challenge the Department's actions must be denied in order to avoid a violation of the separation of powers clause of the Constitution. This contention is totally unfounded.

<sup>16</sup> Indeed, as Judge Bork noted in his opinion in *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987):

the Supreme Court has never said explicitly that the separation of powers clause concept leads it to deny [standing] where it otherwise might be found . . . .

*Id.* at 807.

NWF is not "seeking judicial supervision of the Secretary's entire administration, throughout the Nation, of his duties under FLPMA." Gov. Br. at 23. Instead, like the plaintiffs in *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 97 (1983), who sought compliance with the reporting requirements of NEPA, NWF is asking only that the "agency conform[] with controlling statutes." As such, this litigation is not so "overwhelming" as the Secretary suggests. Gov. Br. at 22. In fact, it is currently submitted for final adjudication on cross-motions for summary judgment.

Further, the source of the alleged violation of the separation of powers clause cited by the Secretary is not the court of appeals' recent standing decision but rather the preliminary injunction upheld by the court of appeals nearly two years ago. The Department chose not to seek review of that decision; perhaps because the vast majority of the Department's activities were unimpeded by the injunction. As the district court made clear:

activities that would have been permitted on the affected public lands under the previous withdrawals and classifications prior to revocation or termination may still take place.

(Gov. App. 146a). These same withdrawals and classifications were originated by the Department and were in effect for decades prior to their termination. The effect of the court's preliminary injunction was merely to reinstate these withdrawals and classifications.

The preliminary injunction subsequently has been dissolved. However, in the three years it was in place, only four individuals intervened in the case seeking an

exemption from its provisions.<sup>17</sup> The Department itself never sought prior permission of the district court to proceed with any individual management action.

In its request for permanent relief, NWF merely prays that the Department's actions be conducted in accordance with statutory requirements, including, for example, the completion of EISs under NEPA. That this task may prove burdensome to the Department, according to the Secretary, hardly relieves the agency of its statutory obligations; nor does it remove the jurisdiction of the federal courts to review NWF's claims.<sup>18</sup>

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<sup>17</sup> In three instances, it was the Department's own overbroad interpretation of the injunction that required the intercession of the district court. See, e.g., Order (January 6, 1987) ("the preliminary injunction . . . does not apply to the geothermal operations of the Department of Water and Power for the City of Los Angeles . . . [and the Department] shall forthwith vacate and set aside its suspension order . . .") (Gov. App. 165a-66a).

<sup>18</sup> Under the APA, agency action is judicially reviewable: except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.

5 U.S.C. § 701(a). Over the years, this Court has emphasized that this is a very narrow exemption. As the Court explained in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), the reason for this rule is that:

[w]e ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.

*Id.* at 681.

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## B. Standing to Challenge Government Programs Has Not Been Abolished

Mountain States' suggestion that this Court essentially has eliminated all challenges to government programs is baseless. Neither *Ashwander v. TVA*, 297 U.S. 288, nor *Allen v. Wright*, 468 U.S. 737, provides support for this proposition.

In *Ashwander v. TVA*, shareholders of the Alabama Power Company brought a challenge to the constitutionality of the "Tennessee Valley Authority Act in all its bearings" based upon the execution of a single contract with the Alabama Power Company. 297 U.S. at 325. The plaintiffs also sought to have the Court issue a "decision of abstract questions as to the right of the Authority and of the Alabama Power Company in possible contingencies." *Id.* This Court sustained the circuit court's determination to limit the plaintiffs' challenge to the validity of the contract itself, finding that the plaintiffs' other claims were founded "merely upon 'assumed potential invasions' of rights . . . ." *Id.* at 324-25 (quoting *Arizona v. California*, 283 U.S. 423, 462 (1931)).

The United States Court of Appeals for the District of Columbia Circuit explained and applied *Ashwander v.*

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Moreover, this is not a case like *Webster v. Doe*, 108 S. Ct 2047, 2052 (1988), in which the applicable statutory standard "exudes deference" to the agency and thus "foreclose[s] the application of any meaningful judicial standard of review." The Secretary can make no claim that such unbridled discretion is available to him under the applicable provisions of FLPMA and NEPA. See, e.g., NEPA § 102, 42 U.S.C. § 4332 ("all agencies of the Federal Government shall include . . . a detailed statement . . . on the environmental impact of the proposed action . . . .")

*TVA in Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission (SIPI)*, 481 F.2d 1079 (1973), commenting that *Ashwander* stands for the unsurprising proposition that:

[t]raditional principles of ripeness dictate that judicial review be reserved for problems which are real and present, not hypothetical and remote.

*Id.* at 1087 n.29.<sup>19</sup> The court of appeals in *SIPI* went on to hold that even though the liquid metal cooled fast breeder reactor [LMFBR] program at issue in *SIPI* was "in the research and development stage and no specific implementing action which would affect the environment had yet been taken," the program was of sufficient "definite and concrete character" to overcome the *Ashwander* concerns. *Id.* Thus, the distinguishing factor in *SIPI* was the lack of abstract questions, not the number of proposed actions, as Mountain States contends.<sup>20</sup> Mountain States Legal Foundation's Petition for a Writ of Certiorari [hereinafter MSLF Br.] at 12.

In the instant case, the challenged program also has found sufficient "fruition in action of a definite and

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<sup>19</sup> Compare *Duke Power v. Carolina Environmental Study Group*, 438 U.S. 59 (1978) (plaintiffs living in proximity to proposed nuclear facilities were held to have standing to challenge the constitutionality of the Price-Anderson Act.)

<sup>20</sup> Mountain States' description of *SIPI* is simply incorrect. The goal of the LMFBR program was to develop new nuclear reactor technology for "widespread deployment," not merely to build a single facility. *SIPI*, 481 F.2d at 1082.

concrete character" to be ripe for review. *Ashwander v. TVA*, 297 U.S. at 324. By its own admission, the Department has already completed several hundred terminations of withdrawals and classifications under the auspices of the Program and, as a direct result, mining claims have been staked and oil and gas leases issued. Affidavit of Joseph J. Martyak (December 16, 1985) (J.A. 119-59). NWF need not wait until each of the Program's proposed activities are completed to seek review of the Department's legal failures regarding the formulation and implementation of the Program.

Mountain States' discussion of the Court's holding in *Allen v. Wright*, 468 U.S. 737, is also wrong. The case does not support Mountain States' sweeping statement that this Court has eliminated standing to challenge government programs. This Court and other federal courts have upheld numerous legal challenges to government action on a programmatic scale.<sup>21</sup> As the court of appeals

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<sup>21</sup> See, e.g., *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock*, 477 U.S. at 281-91 (union had standing to pursue across-the-board challenge to Department of Labor policy on eligibility for trade readjustment allowance benefits on the basis of injury to any one of union's members); *Blum v. Yaretsky*, 457 U.S. 991 (1982), (Gray Panthers organization and patients in skilled nursing facilities had standing to challenge New York State's Medicaid program which denied benefits to patients recommended for transfer to facilities providing a reduced level of care); *Watt v. Energy Action Education Foundation*, 454 U.S. 151 (challenge to the federal government's five-year offshore mineral leasing program; standing upheld to seek review of the

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recognized, Mountain States' suggestion that NWF ought to file separate challenges to each of the hundreds of actions completed under the Program at issue in this case, MSLF Br. at 12, is both "unsupported by caselaw" and "illogical." (Gov. App. 55a-56a). NWF is challenging a "pattern of practice embodied in the Department's conduct of its Program." (*id.*); see *NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149, 158 (1st Cir. 1987). The mere fact that separate decision notices of each termination were issued by the Department is irrelevant when, as NWF alleges, each decision to terminate individual classifications and withdrawals was guided by

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(Continued from previous page)

Secretary of the Interior's choice of bidding systems for lease issuance); *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981) (without passing on standing, the Court heard a challenge to the validity of an FCC policy statement that had not yet been applied to any set of facts); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) (sellers of data processing services had standing to challenge a ruling of the Comptroller of the Currency allowing national banks to provide such services); *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir. 1988), (environmental organizations had standing to challenge the Secretary of the Interior's determination that all federally-funded projects in foreign countries were exempt from the consultation provisions of the Endangered Species Act, 16 U.S.C. § 1536(a)(2) (1982)); *Oregon Environmental Council v. Kunzman*, 817 F.2d 484 (9th Cir. 1987) (environmental organizations had standing to challenge the nationwide pesticide spraying program of the U.S. Forest Service); and *National Wildlife Federation v. Hodel*, 839 F.2d 694 (D.C. Cir. 1986) (environmental organizations had standing to challenge the national regulatory program of the federal Office of Surface Mining).

unlawful directives at the Program level.<sup>22</sup> It makes little sense either for coherent management of the federal lands or for the exigencies of the federal court system to force multiple lawsuits challenging these same violations of law.<sup>23</sup>

The Court's opinion in *Allen v. Wright* does not require such an irrational result. The opinion in *Allen v. Wright* holds that where a plaintiff cannot show that his injury is "fairly traceable" to the challenged actions of a government program, the separation of powers clause of the Constitution prohibits a grant of standing. *Id.* at 761 n.26. The plaintiffs in *Allen v. Wright* were challenging the tax-exempt status of racially discriminatory schools. The

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<sup>22</sup> For example, NWF is seeking the preparation of a programmatic EIS under NEPA in accordance with this Court's decision in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

Mountain States attempts to distinguish the instant case from *Kleppe* by arguing that the Program at issue will have no cumulative impacts. MSLF Br. at 12-13. This is a merits question that has little bearing on NWF's standing. Furthermore, the Program will determine the legal status of millions of acres of federal lands. The impact of such massive shifts in land use will be profound. Indeed, Mountain States itself has identified a range of environmental impacts stemming from the Program, *id.*; none of which was analyzed in the context of an EIS. For example, the Program already has opened two million acres of land in the Colorado watershed to mineral and agricultural development. Yet, the cumulative effects of this development on the watershed were never considered.

<sup>23</sup> This piecemeal litigation would provide no opportunity for the Department to correct any generic deficiencies in the conduct of its Program and to proceed lawfully with respect to future actions. Instead it would require the courts to undo each and every withdrawal and classification termination.

majority found the chain of causation between the plaintiffs' injury, the diminished availability of a desegregated education, and the defendants' actions, the tax exemptions, to be too attenuated to confer standing.

The instant case presents *no* similar facts. Should the court in the instant case order the Department to prepare EISs in compliance with the provisions of NEPA, the Department presumably will comply with the court's order and NWF will receive the information on environmental impacts it has thus far been denied. Moreover, the withdrawals and classifications which the Department seeks to eliminate represent an absolute bar to specified uses of federal lands. If the withdrawals and classifications at issue in the instant case are continued, the Court is entitled to assume that third parties will act lawfully and will not initiate development activities on lands that are closed to them and that, therefore, NWF's members' use of those lands will not be impaired. Under these circumstances, a determination that plaintiffs have standing is wholly proper. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. at 45 n.25 (standing to challenge government action is proper where third party conduct would have been illegal absent government action).

Finally, Mountain States seeks to convey the impression that this case inevitably must have radical and unusual impacts on third parties. This simply is not so. Litigation often has impacts on individuals who are not parties. Contrary to Mountain States' assertions, however, the instant case need have no impact at all on those individuals who relied on the actions of the Department and who acquired title to federal lands prior to the filing

of NWF's complaint. MSLF Br. at 13-15. There is no cloud on their title. NWF has not asked the district court to invalidate pre-existing mining claims or mineral leases or to overturn completed sales or exchanges of previously withdrawn lands. (Gov. App. 145a). In its request for a preliminary injunction, NWF merely sought the preservation of the *status quo* by preventing the staking of new mining claims, the issuance of additional mineral leases, and the loss of additional public lands to private interests during the pendency of this litigation. Similarly, NWF's request for permanent relief merely asks that the same *status quo* be maintained until the Department has complied with the statutory requirements for opening these lands.

This is not a draconian request. Investment uncertainty is nothing new for would-be mining claimants and mineral leaseholders, just as it is nothing new for persons who wish to consummate other land transactions with the Department, or to obtain permits or other authorizations for private activities on public lands. Such persons hold no more than an expectancy of government largess, with no assurance that government benefits will be forthcoming.<sup>24</sup>

<sup>24</sup> See, e.g., *Lewis v. Hickel*, 427 F.2d 673 (9th Cir. 1970) (rejection of land exchange based upon adoption of new regulations was proper; until lands are patented, transaction constitutes nothing more than a proposal under which no contract rights arise); *Winkler v. Andrus*, 614 F.2d 707 (10th Cir. 1980) (Secretary of the Interior has broad authority to cancel leases for administrative errors); *Ideal Basic Industries, Inc. v. Morton*, 542 F.2d 1364 (9th Cir. 1976) (Secretary of the Interior has

(Continued on following page)

In any event, the court of appeals' decision is interlocutory. There is no final decree in this case. What the eventual outcome may be is unknown at this time. In the interim, mere speculation about the relief that ultimately might be granted should not act as a bar to any adjudication of NWF's claims. Full consideration of all the equities involved necessarily will precede the issuance of any permanent injunction. *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

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### CONCLUSION

For the reasons stated above, the petitions for writs of *certiorari* should be denied.

Respectfully Submitted,

KATHLEEN C. ZIMMERMAN  
NORMAN L. DEAN, JR.\*  
NATIONAL WILDLIFE FEDERATION  
1400 16th St., N.W.  
Washington, D.C. 20036  
(202) 797-6864

December, 1989

\*Counsel of Record

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(Continued from previous page)

continuing jurisdiction with respect to public lands and he is not estopped by principles of the finality of administrative action from correcting an erroneous decision made by his subordinates or predecessors).

Nos. 89-628, 89-640

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In The

**Supreme Court of the United States**

October Term, 1989

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MOUNTAIN STATES LEGAL FOUNDATION, ET AL.,

*Petitioners,*

v.

NATIONAL WILDLIFE FEDERATION,

*Respondent.*

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MANUEL LUJAN, JR., SECRETARY  
OF THE INTERIOR, ET AL.,

*Petitioners,*

v.

NATIONAL WILDLIFE FEDERATION,

*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The District of Columbia Circuit**

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**APPENDIX TO BRIEF IN OPPOSITION OF  
RESPONDENT NATIONAL WILDLIFE FEDERATION**

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IN THE  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION, )	
Plaintiff, )	
v. )	Civil Action
ROBERT F. BURFORD, <i>et al.</i> , )	No.
Defendants. )	85-2238-JHP

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DECLARATION OF DAVID DORAN

Declarant, DAVID DORAN, being duly sworn and under penalty of perjury, based upon personal knowledge of the following facts as specifically appears herein, deposes and says:

1. I am a member of the National Wildlife Federation (NWF) and its affiliate the Oregon Wildlife Federation (OWF).
2. I reside at 2753 N. 32nd, Springfield, Oregon 97477.
3. I frequently use the public lands, in particular, I use the federal lands adjacent to Coos Bay located along the south-central coast of Oregon. These lands are administered by the Bureau of Land Management (Bureau) and the U. S. Department of the Interior (Department).
4. My uses of these federal lands include hunting, fishing, camping and hiking. I pursue these activities for recreational purposes and aesthetic enjoyment. I hunt both elk and black tail deer on these federal lands located along the north spit of Coos Bay and fish off coastal areas which are also located on, or which can only be accessed

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through, these federal lands. I derive substantial benefits (sic) of food and sport from such hunting and fishing.

5. I also hike and camp on these federal lands along the northern and southern spits of Coos Bay. From these activities I benefit (sic) through aesthetic enjoyment of the rich natural beauty of these lands and the interesting and diverse species of wildlife which inhabit the Coos Bay habitat. Several of the bird species I have viewed, such as the snowy plover (a state listed endangered species) and peregrine falcon, are quite rare with a substantial percentage of their population inhabiting the federal lands adjacent to Coos Bay.

6. I am aware that my continued recreational and aesthetic enjoyment of the Coos Bay lands depends upon their being managed by the Bureau and Department in full compliance with the laws pertaining to the preservation and protection of the federal lands they administer.

7. I am also aware that the National Wildlife Federation has filed a lawsuit against the Bureau and the Department for unlawfully revoking protective land withdrawals and unlawfully terminating protective land classifications on the public lands pursuant to the Department's Land Withdrawal Review Program.

8. Among the Departmental actions challenged in the NWF lawsuit is the decision to revoke Secretarial Orders of December 13, 1887, and September 20, 1890, which opened 1,558 acres of land which I use to surface entry and mining. This revocation also made 47 acres of land which I use available for disposal by exchange. 49 Fed. Reg. 17502.

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9. These unlawful actions of the Bureau and the Department adversely affect my interest in recreational use and aesthetic enjoyment of the federal lands by opening these lands to development activities which threaten the aesthetic beauty and wildlife habitat of these lands. These actions also adversely affect my interest in seeing that the Bureau and Department fully comply with the laws pertaining to the preservation and protection of natural resources on the federal lands they administer.

10. My interests are being fully and adequately represented (sic) by the NWF in its lawsuit against the Bureau and the Department and my above stated injuries will be fairly redressed by a decision favorable to NWF.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 18, 1988.

/s/ David W. Doran  
DAVID DORAN

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IN THE  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION,	)	
Plaintiff,	)	
v.	)	Civil Action
	)	No.
ROBERT F. BURFORD, <i>et al.</i> ,	)	85-2238-JHP
Defendants.	)	

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DECLARATION OF MERLIN McCOLM

Declarant, MERLIN McCOLM, being duly sworn and under penalty of perjury, based upon personal knowledge of the following facts as specifically appears herein, deposes and says:

1. I am a member of the National Wildlife Federation (NWF).
2. I reside in Elko, Nevada. My address is P.O. Box 1362, Elko, Nevada 89801.
3. I use the public lands extensively. In particular, I use the federal lands administered by the Bureau of Land Management (Bureau) and the Department of the Interior (Department). I have used and I continue to use such federal lands located throughout the state of Nevada and elsewhere. Particular areas which I use frequently include the Roberts Mountains south of Elko and the Tuscarora Mountains and Independence Range to the northwest of Elko.
4. My use of these public lands is for purposes of recreation and aesthetic enjoyment. I hunt deer, antelope, sage

grouse and other game species for sport and food, and often travel to particular tracts of the above mentioned federal lands where habitats for these species are known to exist.

5. My recreational and aesthetic enjoyment of these lands depends upon their being managed by the Bureau and Department in full compliance with the laws pertaining to the preservation and protection of the federal lands they administer.

6. I am aware that the National Wildlife Federation has filed a lawsuit against the Bureau and the Department for unlawfully revoking protective land withdrawals and unlawfully terminating protective land classifications on the public lands pursuant to the Department's Land Withdrawal Review Program.

7. Pursuant to this unlawful Program, the Bureau and Department has revoked withdrawals and terminated classifications covering specific areas which I use for the above stated recreational and aesthetic purposes. For example, areas adjacent to the Roberts and Tuscarora Mountains which I use (and which have been protected as water reserves under Executive Orders dated February 8, 1923 and November 20, 1925) have been opened to mining and other forms of development by means of these unlawful actions by the Bureau and Department. 47 Fed. Reg. 6851, 7236. I have since personally observed evidence of ecological damage to these areas and others in the form of sedimentation from mining runoff and direct habitat destruction.

8. These unlawful actions by the Bureau and the Department have resulted in actual injury to my recreational use

and aesthetic enjoyment of these federal lands. By opening many specific areas which I use to the staking of mining claims, oil and gas leasing and other forms of development, such actions injure my enjoyment of these lands by threatening the aesthetic beauty and wildlife habitat potential of these lands.

9. These unlawful actions of the Bureau and the Department adversely affect my interest in recreational use and aesthetic enjoyment of the federal lands, and adversely affect my interest in seeing that the Bureau and Department fully comply with the laws pertaining to the preservation and protection of the federal lands and their natural resources.

10. My interests are being fully and adequately represented by the NWF in its lawsuit against the Bureau and the Department and my above stated injuries will be fairly redressed by a decision favorable to NWF.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 16, 1988.

/s/ Merlin McColm  
MERLIN McCOLM

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION, )	
Plaintiff, )	
v. )	Civil Action
ROBERT F. BURFORD, <i>et al.</i> , )	No.
Defendants. )	85-2238-JHP

DECLARATION OF STEPHEN BLOMEKE

Declarant, STEPHEN BLOMEKE, being duly sworn and under penalty of perjury, based upon personal knowledge of the following facts as specifically appears herein, deposes and says:

1. I am a member of the National Wildlife Federation (NWF) and its affiliate the Colorado Wildlife Federation (CWF).
2. I reside at 1715 Ninth Avenue, Longmont, Colorado 80501.
3. I have lived in Colorado for eight years. During that time I have frequently used the federal lands which are administered by the Bureau of Land Management (Bureau) and the U.S. Department of the Interior (Department). I currently use these federal lands located throughout the state of Colorado and elsewhere, and I intend to continue such frequent and widespread use into the future.

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4. I use these federal lands for recreational purposes and aesthetic enjoyment. My uses include hunting, fishing, camping and hiking. Among the game animals I hunt are grouse, deer, elk, antelope and ptarmigan. I fish primarily trout.
5. I often travel considerable distances across the state of Colorado to access areas containing prime habitat for these species. In so doing, I have used and continue to use the various campgrounds and recreation areas located on these federal lands.
6. Because of my extensive use of these federal lands, I have a personal interest in the management programs of the Bureau and the Department. My continued recreational and aesthetic enjoyment of these lands depends upon their being managed by the agencies in full compliance with the laws relating to preservation and protection of natural resources on the public lands they administer.
7. I am aware that the National Wildlife Federation has filed a lawsuit against the Bureau and the Department for unlawfully revoking protective land withdrawals and unlawfully terminating protective land classifications on the public lands pursuant to the Department's Land Withdrawal Review Program.
8. I am also aware that many Public Land orders and Secretary of the Interior orders have withdrawn specific areas of the federal lands which I use for recreational and aesthetic uses. These include: Public Land Order 2302 of March 14, 1961 (Indian Peaks Campground), Public Land Order 2553 of December 11, 1961 (Strawberry Campground), Public Land Order 2558 of December 11, 1961 (Gordon Gulch Campground, Ward Picnic Ground, Park

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Creek Recreation Area and Sheep Creek Fish Habitat Study Area), and Public Land Order 2732 of July 19, 1962 (Buffalo Pass Campground).

9. Pursuant to the above stated Withdrawal Review Program, the Bureau and the Department unlawfully revoked all of the protective withdrawals which I use and which are mentioned in paragraph 8 above. See Public Land Order 6170, 47 Fed. Reg. 7414 *et. seq.* (Appendix I attached hereto).
10. As a result of these unlawful actions by the Bureau and the Department, these specific federal lands which I frequently use for the above stated recreational purposes and aesthetic enjoyment have been opened to the staking of mining claims and other forms of development. Such actions injure my enjoyment of these lands by threatening the aesthetic beauty and wildlife habitat potential of these lands.
11. My interest in recreational use and aesthetic enjoyment of the federal lands, and my interest in seeing that the laws pertaining to the preservation and protection of federal lands and their natural resources are complied with, have been adversely affected by these unlawful actions of the Bureau and the Department.
12. My interests are being fully and adequately represented by NWF in its lawsuit against the Bureau and the Department and my above stated injuries will be fairly redressed by a decision favorable to NWF.

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I declare under penalty of perjury that the foregoing  
is true and correct.

Executed on August \_\_, 1988.

/s/  
STEPHEN BLOMEKE

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App. 11

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION,	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No.
ROBERT F. BURFORD, <i>et al.</i> ,	)	85-2238-JHP
Defendants.	)	

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DECLARATION OF A. L. (WILL) OUELLETTE

Declarant, A.L. (WILL) OUELLETTE, being duly sworn and under penalty of perjury, based upon personal knowledge of the following facts as specifically appears herein, deposes and says:

1. I am a member of the National Wildlife Federation (NWF) and its affiliate the New Mexico Wildlife Federation (NMWF).
2. I reside at Star Route, Box 12, Placitas, New Mexico 87043.
3. I have used the federal lands extensively for many years and I continue to use these lands almost on a daily basis. In particular, I use the federal lands which are administered by the Bureau of Land Management (Bureau) and the U.S. Department of the Interior (Department).
4. Areas of these federal lands which I have used and continue to use include the Lincoln, Pecos, Cibola, Gila and Carson National Forests, especially the wilderness areas associated with these forests, and adjacent lands

managed by the Bureau. I also use federal lands administered by the Bureau in the San Mateo Mountains, Mount Taylor, the Florida Mountains, and the White Oaks area.

5. I use these federal lands for recreational purposes and for aesthetic enjoyment. My uses include extended overnight camping, backpacking, and day hiking through the mountains, hunting, fishing, picnicing, horseback riding, packing with horses, and driving along scenic roads. The species I hunt include deer, barbary sheep, bear, coyote, elk, antelope, wild turkey and ibex.

6. Another specific area which I frequently visit is the Tent Rocks Picnic Area. My use there is mainly for aesthetic enjoyment of that area's scenic rock formations and other vistas.

7. My recreational and aesthetic enjoyment of the above mentioned federal lands largely depends upon their being managed by the Bureau and the Department in full compliance with the laws pertaining to the preservation and protection of the federal lands they administer.

8. I am aware that the National Wildlife Federation has filed a lawsuit against the Bureau and the Department for unlawfully revoking protective land withdrawals and unlawfully terminating protective land classifications on the public lands pursuant to the Department's Land Withdrawal Review Program.

9. I am also aware that the specific federal lands which I use are among the federal lands which were protected by the withdrawals and classifications that were revoked and terminated under the above stated Withdrawal Review Program. These include, but are not limited to,

the Tent Rocks Recreation Area (protected by classification NM 9491 of September 17, 1970, 35 Fed. Reg. 14564, 14565, *unlawfully terminated* by Notice of June 9, 1981, 46 Fed. Reg. 31776, 31777) (see appendices I, II, and III attached hereto); areas of Lincoln National Forest (protected by Public Land Order No. 656 of August 15, 1950, *unlawfully revoked* by Public Land Order 5827 of February 20, 1981, 46 Fed. Reg. 7339, 7340); and areas of the Gila National Forest (protected by Secretarial Order of October 4, 1941, *unlawfully revoked* by Public Land Order 6314 of August 17, 1982, 47 Fed. Reg. 35768, 35769).

10. These unlawful actions by the Bureau and the Department have resulted in actual injury to my recreational use and aesthetic enjoyment of federal lands by opening specific areas which I use to the staking of mining claims, oil and gas leasing and development, disposal by exchange and other uses which adversely affect the aesthetic beauty and wildlife habitat potential of these lands.

11. My interest in recreational use and aesthetic enjoyment of the federal lands, and my interest in seeing that the laws pertaining to the preservation and protection of federal lands and their natural resources are complied with, have been adversely affected by the unlawful actions of the Bureau and the Department.

12. My above stated interests are being fully and adequately represented by NWF in its lawsuit against the Bureau and the Department and my above stated injuries will be fairly redressed by a decision favorable to NWF.

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I declare under penalty of perjury that the foregoing  
is true and correct.

Executed on August 30 , 1988.

/s/ A.L. "Will" Ouellette  
A L. (WILL) OUELLETTE

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IN THE  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION,	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No.
ROBERT F. BURFORD, <i>et al.</i> ,	)	85-2238-JHP
Defendants.	)	

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DECLARATION OF PEGGY KAY PETERSON

Declarant, PEGGY KAY PETERSON, being duly sworn and under penalty of perjury, based upon personal knowledge of the following facts as specifically appears herein, deposes and says:

1. I am a member of the National Wildlife Federation (NWF).
2. On April 7, 1986, I executed an affidavit which was filed in the instant civil action. I hereby incorporate that affidavit herein in its entirety.
3. I continue to reside at 3519 Partridge Lane, Casper Wyoming 82604.
4. I also continue to use the federal lands including those in the vicinity of the South Pass-Green Mountain area of Wyoming for recreational purposes and aesthetic enjoyment as stated in my April 7, 1986, affidavit. In particular, I use these federal lands for hiking, camping, hunting and fishing. I primarily hunt large game including deer and elk which are known to occupy these federal lands.

5. I specifically use the federal lands administered by the Bureau and the Department which were described in the order dated November 22, 1967, (32 Fed. Reg. 16057, 16058) classifying such lands for multiple-use management and segregating such lands from appropriation under the general mining laws.

6. I am aware that the above mentioned classification was unlawfully terminated by order dated April 30, 1984, with respect to these areas of the federal lands which I use. 49 Fed. Reg. 19904. This action by the Bureau and Department unlawfully removed the protection of natural resources afforded by the classification by opening such lands to location under the mining laws in violation of the laws pertaining to the preservation and protection of natural resources on the federal lands.

7. Further, I am aware that U.S. Energy Corporation has filed a mine permit application with the Bureau and Department, (U.S. Energy Application, TFN 2 4/86), which includes a proposal to mine a significant portion of the federal lands which I use for recreational purposes and aesthetic enjoyment.

8. A substantial portion of the lands which I use and which are included in the U.S. Energy permit application are identical to those lands described in the classification order mentioned in paragraph 5 above which was terminated by the order mentioned in paragraph 6 above.

9. My interest in recreational use and aesthetic enjoyment of these specific tracts of federal lands has been adversely affected by the Bureau's and Department's unlawful termination of a protective land classification. Such action, by authorizing the U.S. Energy mine permit

application causes substantial injury to my uses of these federal lands by threatening the aesthetic beauty and wildlife habitat potential of these lands.

10. My interests continue to be fully and adequately represented by NWF in its lawsuit against the Bureau and the Department and my interests will be fairly redressed by a decision favorable to NWF.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 28th, 1988.

/s/ Peggy Kay Peterson  
PEGGY KAY PETERSON

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No. 89-600

1

Supreme Court, U.S.

FILED

DEC 27 1989

JOSEPH F. SPANIOLO, JR.  
CLERK

**In the Supreme Court of the United States**

**OCTOBER TERM, 1989**

**MANUEL LUJAN, JR.,  
SECRETARY OF THE INTERIOR, ET AL., PETITIONERS**

**v.**

**NATIONAL WILDLIFE FEDERATION, ET AL.**

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**REPLY BRIEF FOR THE PETITIONERS**

**JOHN G. ROBERTS, JR.  
Acting Solicitor General  
Department of Justice  
Washington, D.C. 20530  
(202) 633-2217**

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**In the Supreme Court of the United States**

OCTOBER TERM, 1989

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No. 89-640

MANUEL LUJAN, JR.,  
SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

NATIONAL WILDLIFE FEDERATION, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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**REPLY BRIEF FOR THE PETITIONERS**

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This case concerns fundamental principles of this Court's standing jurisprudence—implicated by the specific question whether a federal court may effectively supplement a plaintiff's standing allegations by "presuming" facts that the plaintiff has not, and perhaps cannot, allege on its own. The court of appeals held that respondent had sufficiently demonstrated its standing in this case when it submitted the single affidavit of one of its members, Peggy Kay Peterson. Ms. Peterson averred that her recreational use of federal lands—and, in particular, those lands "in the vicinity of the South Pass-Green Mountain area of Wyoming"—had been affected by unlawful actions taken by petitioners. Although the court of appeals acknowledged that only 4,500 acres of that 2,000,000-acre federally

managed area had been affected by petitioners' land use decisions, and that Ms. Peterson had not alleged any use of those particular 4,500 acres, the court held that the affidavit could be read "to *presume* that the 4500 newly opened acres included the areas that Peterson uses" (Pet. App. 16a-17a). Without such a "presumption," the court added, Peterson's use and enjoyment "would not be 'adversely affected.' \* \* \* If Peterson was not referring to lands in this 4500-acre affected area, her allegation of impairment to her use and enjoyment would be meaningless, or perjurious" (*id.* at 17a). Refusing to entertain either possibility, the court of appeals determined that Peterson's language must be "read to refer to the lands affected by the Program \* \* \*" (*ibid.*) And, by "presuming" the necessary facts, the court conferred standing on respondent to challenge not only those orders pertaining to the 4,500 affected acres in South Pass-Green Mountain, but also those relating to the entire 180,000,000 acres of federal land at stake in the litigation.

We restate the court of appeals' decision because respondent evidently has no desire to defend it on its own terms. Respondent ignores the court's actual holding; it recharacterizes the decision in terms not articulated by the court itself; and, finally, it supports the court of appeals' judgment on the basis of supplemental affidavits correctly excluded by the trial court. In the end, respondent offers no basis for sustaining the decision below, or the highly intrusive role that decision adopts for the federal courts in overseeing the management authority of the Secretary.<sup>1</sup>

<sup>1</sup> Respondent suggests (Br. in Opp. 2-3), in passing, that the withdrawal revocations effected during the early 1980s resulted from a political shift regarding the extent to which public lands should be opened to mining claims. That suggestion is mistaken. Withdrawal review generally began in the 1950's (Affidavit of Vincent J. Hecker, ¶ 3, attached as an exhibit to Defendant's Motion for Summary Judgment and/or Dissolution of the Preliminary Injunction). And in 1976,

1. Respondent makes no effort to defend the reasoning of the court of appeals.<sup>2</sup> Indeed, respondent's truncated account of the decision (Br. in Opp. 12-13) completely elides the crucial language used by the court of appeals in reversing the district court. As respondent would have it, "[t]he court of appeals did not, as the Secretary suggests, 'presume' that a 'mere claim of standing necessarily implies a factual basis to support it.' Gov. Br. at 21" (*id.* at 17). But respondent is unable to explain the court of appeals' central thesis: that "Peterson's affidavit can be read to *presume* that the 4500 newly opened areas included the areas that Peterson uses; otherwise *her* use and enjoyment would not be adversely affected in any way" (Pet. App. 17a).

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it was Congress that specifically commanded the Secretary to review all withdrawals of BLM lands in 11 key states—withdrawals that had closed those lands to mining claimants or mineral leasing. Section 204(f) of FLPMA, 43 U.S.C. 1714(f).

<sup>2</sup> Respondent does, however, offer two alternative bases—not reached by the court of appeals—to support standing in this case. It first suggests (Br. in Opp. 5-6, 12, 22 & n.15) that standing might be predicated upon Representative Bruce Vento's challenge, stated in Count II of the complaint. But the trial court dismissed that claim and, following the decision by the court of appeals, Representative Vento voluntarily dismissed his appeal. Moreover, even if the Congressman wished to pursue his claim, respondent could not predicate its own standing on that basis. See *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (a party generally "cannot rest [its] claim for relief on the legal rights or interests of third parties").

Second, respondent contends (Br. in Opp. 18 n.11) that it may rest its standing to sue on an "informational standing" theory. The district court (Pet. App. 31a-32a) rejected that claim, however, finding the supporting affidavit to be "conclusory and completely devoid of specific facts" (*id.* at 32a). The court of appeals did not reach that point, preferring instead to sustain respondent's standing on other grounds.

In respondent's view (Br. in Opp. 18), all the court below did was "review[ ] the evidence contained in Ms. Peterson's affidavit, as well as other evidence in the record, and drew the only logical inference available to it, *i.e.*, that Ms. Peterson, in fact, is injured by the Department's actions." But the court of appeals' opinion rested on no such "evidence in the record" (see Pet. App. 17a). The court focused simply on the affidavit itself, presumed enough to give respondent standing, and then moved on.<sup>3</sup>

2. Respondent contends (Br. in Opp. 17) that this Court's decision in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), supports its allegation of standing in this case. For two reasons, the *SCRAP* case does not extend that far. First, unlike the plaintiffs in *SCRAP*, respondent did not advance "allegations which, if proved, would place [respondent] squarely among those persons injured in fact by the [government's] action \* \* \*" (*SCRAP*, 412 U.S. at 690). Even if true, Ms. Peterson's central allegation—that she "use[s] federal lands, including those in the vicinity of the South Pass-Green Mountain area of Wyoming for recreational purposes and for aesthetic enjoyment" (Pet. App. 190a)—does not by its terms assert any "injury in fact by the [government's] action" in this case. To the contrary, Ms. Peterson could easily use and enjoy the vast expanse of the 2 million-acre South Pass-Green Mountain area without ever happening upon, or being in any way

<sup>3</sup> Respondent's alternative suggestion (Br. in Opp. 19)—that this case involves simply the court's "alleged misreading of Ms. Peterson's affidavit"—is also incorrect. The court of appeals read the affidavit correctly, but then, quite explicitly, supplemented it. The court did respondent's work for it, presuming allegations that are simply not in the affidavit. A court of appeals may not find facts that the parties have not adduced on their own. Cf. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986).

affected by, activities on the 0.225% of the land that was subject to the only challenged land actions in this region.<sup>4</sup>

Second, respondent fails to acknowledge *SCRAP*'s additional teaching that, while the simple allegation of specific and perceptible harm may be sufficient to withstand a motion to dismiss for lack of standing, on a motion for summary judgment the plaintiff must show that its allegations are "true and capable of proof at trial" (*SCRAP*, 412 U.S. at 689). The assertion of injury in the Peterson affidavit was clearly not sufficient at summary judgment, when respondent bore an affirmative burden to establish this essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Respondent's claim, at bottom, is that Ms. Peterson used some land in the vicinity of a huge area, a small fraction of which has been affected by challenged activities. And, with that modest toehold, respondent has sought—and been awarded—standing to challenge hundreds of independent land use decisions, covering tens of millions of acres of land. As generous as it

<sup>4</sup> Respondent misstates (Br. in Opp. 16 n.9) our point about the size of South Pass-Green Mountain. We did *not* contend that the area in the vicinity of South Pass-Green Mountain in which Ms. Peterson recreates is 2,000,000 acres; given the vagueness of her affidavit, we have no idea how much land she personally uses. Rather, our point was that the federal landholding at Green Mountain-South Pass comprises about 2 million acres, a point underscored by the trial court as well (see Pet. App. 35a; see also Affidavit of Jack Kelly, Manager of the Lander, Wyoming Resource Area for the Bureau of Land Management, ¶ 24, attached as an exhibit to Defendants' Motion for Summary Judgment and/or Dissolution of the Preliminary Injunction). The Draft Lander Resource Management Plan/EIS cited by respondent was prepared in 1986 (after the events at issue in this litigation), and discussed two small subunits of the 2,077,702-acre area generally known as Green Mountain-South Pass, and originally covered under Classification W-6228.

is, *SCRAP* does not support so extravagant an assertion of standing.

3. Apparently recognizing that the Peterson affidavit is insufficient, respondent devotes much of its response (Br. in Opp. 9-12, 19-22) to an attempt to resuscitate the supplemental affidavits it submitted after the close of the hearing on summary judgment.<sup>5</sup> In respondent's view, "the Secretary asks the Court to place an embargo on any supplementation of the factual record on standing" (*id.* at 20-21). We ask for no such "embargo." Instead, the second question presented is whether the trial court abused its discretion when, consistent with Federal Rule of Civil Procedure 56(c), it refused to consider the untimely affidavits. Plainly, it did not. Even respondent concedes (Br. in Opp. 21 n.14) that Rule 56(c)—albeit under a "narrow reading" of its language—supports the trial court's refusal to accept the new factual materials after the close of the summary judgment hearing.<sup>6</sup>

In no sense was the district court's refusal to accept the additional filings "unfair."<sup>7</sup> At least from the time peti-

<sup>5</sup> Respondent also quotes (Br. in Opp. 20) the court of appeals' statement (Pet. App. 21a) that "[n]o party" disputes the sufficiency of the new affidavits. That is incorrect. We have never conceded the sufficiency of the supplemental affidavits, and we reserve the right to challenge both the sufficiency and bona fides of those filings should the issue be pertinent in any further proceedings.

<sup>6</sup> The only "new evidence" (Br. in Opp. 21 n.14) offered by petitioners at oral argument concerned an update of the number of completed Resource Management Plans. Tr. 55-56, 92. Respondent made no objection to that innocuous submission, and it never requested an opportunity to respond. *Ibid.*

<sup>7</sup> Nor was respondent's submission of factual material "in compliance" (Br. in Opp. 10) with the court's request to the parties for "supplemental memoranda, not exceeding 20 pages, directed to the issue of standing." See Tr. 91-92. The district court did not ask for additional *factual* material, and respondent did not seek leave to submit such items.

tioners filed their summary judgment motion, respondent had known that standing was a central issue. Respondent thereafter had two full years to supply satisfactory affidavits. It failed to do so. And it was respondent that prevented petitioners from exploring the factual basis for respondent's standing—by successfully seeking a protective order on the ground that further development of the facts "would be unreasonably cumulative, duplicative, burdensome, and expensive." Motion to Quash and for a Protective Order 7; Pet. App. 170a. By taking that position, it was respondent, not petitioners, that "place[d] an embargo on any supplementation of the factual record on standing \* \* \*" (Br. in Opp. 20-21).

Respondent's failure to substantiate its claim of standing in this case cannot be excused on "efficiency" grounds—that it would be "wasteful" to make respondent refile its case (Br. in Opp. 21). If, as we contend, respondent's factual submissions were inadequate, then the courts below had no jurisdiction to entertain the lawsuit; concerns about judicial efficiency cannot overcome the absence of jurisdiction. Nor does the ease with which respondent claims (*ibid.*) it can cure the Peterson affidavit excuse the insufficiency of that filing. A similar claim could no doubt be made in many a standing case, but such a claim is no basis for ignoring the governing principles limiting the jurisdiction of the courts. Cf. *Sierra Club v. Morton*, 405 U.S. 727, 735-736 n.8 (1972).<sup>8</sup>

<sup>8</sup> Respondent contends (Br. in Opp. 21) that "[t]his Court repeatedly has remanded cases to permit supplementation of the factual allegations in support of standing," but the cases respondent cites do not support that broad assertion. Although respondent cites an opinion concurring in the judgment in *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 55 n.6 (1976), the Court in that case remanded with instructions to *dismiss* the complaint for lack of standing, without affording the plaintiffs an additional opportunity for fac-

4. Finally, respondent's discussion (Br. in Opp. 23-25) of the "separation of powers clause" (*id.* at 23, 24) misses the point. Simply because respondent has alleged violations of "statutory obligations" (*id.* at 25) does not give the courts authority to act in the absence of the complainant's standing. Nor does it vitiate the highly intrusive nature of this litigation—an unprecedented intrusion on executive managerial authority that even the first panel of the court of appeals recognized as remarkable in its memorandum on rehearing (Pet. App. 117a-118a).<sup>9</sup>

tual development. See 426 U.S. at 46. Similarly, the decision in *Warth v. Seldin*, 422 U.S. 490 (1975), affirmed the dismissal of the complaint by the district court for lack of standing, again without giving the plaintiffs an additional opportunity to develop factual support. See 422 U.S. at 518. *Sierra Club v. Morton*, 405 U.S. 727 (1972), did not involve a remand either; the only issue before the Court was whether to sustain the grant of a preliminary injunction. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377-378 (1982), the Court did remand for further factual development on standing. In the *Havens* case, however, the Court noted that the lower court's dismissal had been on the pleadings alone, and it directed a remand for the purpose of affording plaintiffs an opportunity to make more definite the allegations of the complaint. Here, by contrast, it was not the pleadings alone, but also the evidence in support of the pleadings, that was deficient. Moreover, respondent had repeated opportunities over several years to remedy the defects. It chose not to do so, either because it could not or perhaps because of a broader institutional interest in securing judicial sanction for its standing theories.

<sup>9</sup> As we emphasized in our petition (Pet. 17-18, 22-23), this case implicates fundamental principles of standing doctrine, and the holding below would improperly involve courts in the management of executive functions on an unprecedented scale. Thus, although there is not, as respondent notes (Br. in Opp. 13-14), a direct circuit conflict, this Court's review is warranted. Indeed, the absence of a circuit conflict is hardly surprising, since respondent's allegations are so far-reaching that a similar case could not readily arise in another circuit. If it did, however, it is hard to imagine that another circuit would indulge the same "presumption" about standing, or permit a claim about the use of land "in the vicinity" of affected property to confer standing to challenge land use decisions affecting about 180,000,000 acres of

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

JOHN G. ROBERTS, JR.  
Acting Solicitor General\*

DECEMBER 1989

public land. Perhaps for that reason, respondent is unable to cite a single reported case supporting the decision below.

Respondent also contends that "in order to review this dispute, the Court will have to wade through the evidence presented by both sides and determine the factual content of [respondent's] affidavits and exhibits as well as those submitted by [petitioners]" (Br. in Opp. 19 n.13). That is not so. The court below found the Peterson affidavit entirely sufficient to confer standing. To decide the first question presented, this Court need only review the same affidavit; to decide the second question, the Court need only determine whether the trial court erred in refusing to permit respondent to supplement the Peterson affidavit at the final hour.

\* The Solicitor General is disqualified in this case.

No. 89-628

No. 89-640

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1989

No. 89-628

MOUNTAIN STATES LEGAL FOUNDATION, ET AL.,  
*Petitioners,*

*vs.*

NATIONAL WILDLIFE FEDERATION,  
*Respondent.*

AND

No. 89-640

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.,  
*Petitioners,*

*vs.*

NATIONAL WILDLIFE FEDERATION,  
*Respondent.*

ON PETITIONS FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

**BRIEF AMICUS CURIAE OF  
AMERICAN MINING CONGRESS**

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*Amicus Curiae* adopts the Appendix filed by the Federal Petitioners in Docket 89-640. References to pages in that Appendix shall be stated as "App." followed by the page number(s).

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ON PETITIONS FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

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**BRIEF AMICUS CURIAE OF  
AMERICAN MINING CONGRESS**

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**INTRODUCTION**

On July 15, 1985, the National Wildlife Federation ("NWF") filed a suit against the United States Department of the Interior complaining that the Bureau of Land Management ("BLM") was improperly terminating a multitude

of land classification and withdrawal orders on lands administered by the BLM, and claiming that the termination of these orders would result in disposal or development of vast acreages of public lands. NWF asked for immediate injunctive relief to (1) freeze land classifications and withdrawals as of their status on January 1, 1981 (some four and one-half years earlier) and (2) enjoin the BLM from taking actions inconsistent with the then existing classifications and withdrawals. In essence, NWF seeks to reorder an entire government program.<sup>1</sup>

Battlelines were drawn immediately around the standing issue. In support of its standing to bring the suit, NWF submitted only the thinnest of evidence and, on the basis of this, sought to prohibit uses on more than 180,000,000 acres of federal public lands. The District Court initially upheld the evidence of standing as sufficient to survive a motion to dismiss and granted the preliminary injunction.<sup>2</sup>

On appeal, the Court of Appeals, in a split decision, upheld the District Court's finding that enough had been alleged by NWF as to its standing to survive the motion to dismiss (*Burford I* at 312-314; App. 48a-57a)<sup>3</sup> and that the

<sup>1</sup> *National Wildlife Federation v. Burford*, 676 F. Supp. 271 (D.D.C. 1985) (App. 119a-136a). See also *National Wildlife Federation v. Burford*, 676 F. Supp. 280 (D.D.C. 1986) (App. 137a-150a).

<sup>2</sup> *National Wildlife Federation v. Burford*, 676 F. Supp. 271, *supra*, at 277 and 279 (App. 130a and 136a).

<sup>3</sup> "*Burford I*", the first opinion of the Court of Appeals in this case, is reported as *National Wildlife Federation v. Burford*, 835 F.2d 305 (D.C. Cir. 1987) (App. 38a-115a). A vigorous dissent by Circuit Judge Williams in *Burford I* criticized the granting of the preliminary injunction on the weak proofs offered in support of standing:

The majority today upholds a district judge's self-appointment as *de facto* Secretary of the Interior over 180 million acres — nearly one-fourth of all federal lands and more than half of the public lands managed by the Bureau

District Court did not abuse its discretion in granting the preliminary injunction (*Burford I* at 327; App. 84a-85a).<sup>4</sup> Later, the District Court undertook consideration of the case on cross-motions for summary judgment and granted judgment against NWF on the basis of lack of standing.<sup>5</sup> The Court of Appeals reversed this judgment on the grounds that it had already found sufficient standing in *Burford I* and that was now the law of the case. (*Burford II* at 432-433; App. 18a-20a).<sup>6</sup> It is from *Burford II* that the present Petitions for Writ of Certiorari were filed.

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of Land Management ("BLM"). It does so without a showing that the BLM breached any legal requirement as to a single parcel of land. Even assuming such a breach, the record is barren of any hint that it was material or likely to harm plaintiffs' interests — much less irreparably. Unable to sanction such a judicial usurpation of power, I dissent.

835 F.2d at 327 (App. 85a).

<sup>4</sup> The Court of Appeals denied the motion for rehearing urged after its *Burford I* decision in *National Wildlife Federation v. Burford*, 844 F.2d 889 (D.C. Cir. 1988). There the Court of Appeals noted (at page 889; App. 117a-118a; emphasis added):

It has been over two years since the preliminary injunction was issued. As we stated in our opinion, "[t]his is a serious case with serious implications." 835 F.2d at 327. We noted then, and continue to believe, that some of the criticisms of the breadth and scope of the preliminary injunction offered in the vigorous dissent are not without force. In addition, we are aware that the district court injunction has placed on "hold" for over two years a complex governmental effort to review and adjust its classifications of vast tracts of land. It is also beyond dispute that countless parties are affected by the uncertainties associated with the unsettled status of these lands. For these reasons, we believe that the disposition of these millions of acres should not continue to rest any longer than necessary on the foundation of a preliminary injunction which was entered on consideration of the brief affidavits and cursory materials presented to the court below.

<sup>5</sup> *National Wildlife Federation v. Burford*, 699 F. Supp. 327 (D.D.C. 1988) (App. 26a-37a).

<sup>6</sup> "*Burford II*," the Court of Appeals opinion of which review is

*Amicus Curiae* American Mining Congress, with the permission of all parties in both petition dockets, files this Brief in support of both of those Petitions.

### INTERESTS OF *AMICUS CURIAE*

The American Mining Congress is a non-profit corporation of the State of Colorado, which serves as a trade association composed of (1) producers of most of America's metals, coal, and industrial and agricultural minerals; (2) manufacturers of mining and mineral processing machinery, equipment, and supplies; and (3) engineering and consulting firms and financial institutions that serve the mining industry.

Congress has repeatedly pronounced as a national policy that the domestic mining industry is essential to the country's security and prosperity, 30 U.S.C. 21a, 1602-1605, 1801(a), and that the public lands should be managed in a manner to implement that policy, 43 U.S.C. 1701(a)(12). It appears to *Amicus Curiae* that NWF harbors a different view, that mining activity on public lands is contrary to the nation's interests. That view certainly was the essence of NWF's demand for the preliminary injunction.<sup>7</sup>

The 180,000,000 acres of land which is subject to this suit constitutes more than one-half of all lands administered by the BLM and forty-four percent of all lands owned by the federal government in the western United States, excluding Hawaii and Alaska. Most of the known domestic resources of metallic minerals, other than iron, are situated in the West and there is a strong probability that the public land areas of the West hold greater promise for future mineral discoveries than any other region. Public Land Law

sought by these Petitions, is reported as *National Wildlife Federation v. Burford*, 878 F.2d 422 (D.C. Cir. 1989) (App. 1a-25a).

<sup>7</sup> See *National Wildlife Federation v. Burford*, 676 F. Supp. 271, *supra*, at 279 (App. 135a).

Review Commission, *One Third of the Nation's Land*, 121, 122 (1970).

Already the mining industry's mineral exploration activities in the western United States have been affected by this case, just by virtue of the suit having been filed and then by the issuance of the preliminary injunction. If NWF ultimately prevails in imposing its views on the BLM, the public lands available for mineral supply will be reduced drastically. The mining industry (and the resulting benefits to the prosperity and security of the nation) is largely dependent upon public land mineral resources. Thus, *Amicus Curiae* is keenly interested in the outcome of this case.

### SUMMARY OF ARGUMENT

The Court should grant certiorari because the *Burford II* opinion of the Court of Appeals, in upholding NWF's claim of standing, ignores the constitutional limits on the role of the federal judiciary. The essence of this dispute is whether NWF should be permitted to use the federal courts to mold the national policy to reflect NWF's privately held opinion that all of the public lands which are subject to this suit should be protected from mining. This is a political question for Congress to decide, not a "case or controversy" for the courts to decide. If NWF wishes to proceed with its quest, it should do so by bringing its "argument" to Congress and the executive branch of the government. Accordingly, *Amicus Curiae* respectfully submits, this suit is barred by considerations more fundamental than the issue of standing. If this Court agrees that NWF is asking the courts to intrude on the representative branches of government, then it is not necessary to reach the question of whether NWF "lined up enough ducks" on the standing issue.

Furthermore, this Court will find, as is pointed out in the briefs filed by the Petitioners, that the standing showings offered by NWF are defective under even the most liberal cases.

And, finally, to resolve the concerns of NWF, the District Court will be forced to review and administer an entire governmental program rather than to carry out a proper function of the courts: determining the propriety of a particular federal agency action. NWF's goal in forcing the program review is to impose on the country its narrow view of the public good. The very fact that this suit was filed has disrupted the BLM's conduct of its business, as well as the business of third parties, such as those in the mining industry, which cannot operate without stability in the government's programs and policies concerning public lands. Review of federal agency programs is not the proper use of the federal judiciary.

## ARGUMENT

### A. NWF's Suit Should be Dismissed as Not Justiciable Because it Asks the Court to Ignore the Separation of Powers Doctrine.

No matter what is thought of NWF's claims to have satisfied the required showings for standing and no matter what is thought of the minimal requirements to establish standing under cases like *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), and *Defenders of Wildlife, Friends of Animals v. Hodel*, 851 F.2d 1035 (8th Cir. 1988), this case is outside of the universe of cases that may properly be undertaken by the federal courts. This case involves an entire governmental program. Congress established that program in 1976 by requiring the Secretary of the Interior to review the withdrawals of the public lands at question in this case to determine which withdrawals should be continued or revoked, and authorized the Secretary to terminate those administratively created withdrawals which are no longer needed. Congress placed the deadline for the completion of this withdrawal review program at October 22, 1991. 43 U.S.C. 1714(l).

This withdrawal review program is a political matter, not a justiciable question. The separation of powers doctrine requires the federal courts to limit their authority to justiciable questions and keep out of the political aspects of government.<sup>8</sup> *Allen v. Wright*, 468 U.S. 737 (1984).

It is submitted that the separation of powers doctrine is not a standing concept.<sup>9</sup> Standing focuses on whether the particular plaintiff properly brings a case within the judicial limits of Article III. The separation of powers doctrine, though also rooted in Article III, focuses on the justiciability of the issue. If, in order to satisfy the plaintiff, the federal court must encroach upon the realm of the legislative and/or executive branches of the government, then the separation of powers doctrine bars the suit. *Allen v. Wright*, *supra*, at 759. Whether it is labelled a question of standing or not, the essential and underlying inquiry is, under our system of the separation of powers, should the courts undertake the case.

In *Allen v. Wright*, *supra*, 759-60, this Court stated:

The idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that the respondents' alleged injury "fairly can be traced to the challenged action". . . . That conclusion would pave the way generally for suits challenging, not specifically identifiable Government violations of the law, but the particular programs agencies establish to carry out their legal obligations. *Such suits, even when premised on allegations of several instances of violations of*

<sup>8</sup> This issue was raised before the Court of Appeals, but is not squarely addressed in the *Burford II* decision.

<sup>9</sup> An analysis of this principle is provided in Coyle, *Standing of Third Parties to Challenge Administrative Agency Actions*, 76 Cal. L. Rev. 1061, 1091-1093 (1988).

*the law, are rarely if ever appropriate for federal-court adjudication.*

(Emphasis added.)

The very situation this Court in *Allen* warned against is the situation in this case. NWF has not complained of a specific violation of law which has in fact harmed one of its members. Instead, though complaining that there are general violations of the law, NWF in reality wants to halt an entire governmental program.

In language which is verbatim applicable to this case, this Court in *Allen* said:

When transported into the Art III context, [the principle that government be ~~granted~~ the widest latitude in the dispatch of its own internal affairs], grounded as it is in the idea of separation of powers, counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. *The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to "take Care that the laws be faithfully executed."* U.S. Const., Art. II, § 3. We could not recognize respondents' standing in this case without running afoul of that structural principle.

468 U.S. at 761; emphasis added.

The intrusion upon the separation of powers has been extended further by Congress itself broadening the role of the judiciary by attempting to grant universal standing in

some environmental legislation, such as in the Clean Air Act, 42 U.S.C. 7607(d), and in the Clean Water Act, 33 U.S.C. 1365. The following observations have been made about Congress purporting to grant standing beyond the bounds of the Constitution:

Justice Scalia believes that standing is ultimately related to separation of powers concerns. The power of the Congress to expand standing is, therefore, inescapably limited. In Scalia's view, congressional approval, express or implied, to expanding standing "cannot validate judicial disregard" for the boundaries that exist between branches of government.

• • •

A universal grant of standing, even though an "acquiescence" of Congress to judicial intervention, forces courts to hear the claims of the majority because plaintiffs need not allege palpable injuries that set themselves apart from the general public. . . . The democratic process that inheres in the executive and legislative branches, and not the undemocratic process that inheres in the courts, should resolve and protect the interests of "all-inclusive" classes of citizens.<sup>10</sup>

In this case, NWF is not suing on the basis of legislation where Congress made a universal grant of standing. It should be readily apparent, therefore, that if special interest

<sup>10</sup> Alpert, *Citizen Suits Under the Clean Air Act: Universal Standing For The Uninjured Private Attorney General?*, 16 Boston College Environmental Affairs L. Rev. 283, 304-305 (1988-1989); footnotes omitted; referring to Justice Scalia's *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983).

groups should not be allowed to distort the judiciary's role even where Congress has "authorized" it by granting universal standing, then special interest groups should certainly not be allowed to do so by cases such as this one without congressional encouragement.

More harm is done by allowing actions such as NWF's suit than simply an injudicious stepping on the toes of other branches of government. It has been observed that when special interest groups, such as NWF, succeed in convincing a court to undertake review of a governmental program, they obtain an inappropriate advantage in terms of greater clout and more attention than is warranted vis-a-vis all the other interests which should be considered in the formulation of public policy.<sup>11</sup> This is because special interest advocates are not primarily concerned with presenting all of the issues for the court to decide. Instead, they are primarily concerned, like anyone else contemplating a lawsuit, with presenting only the issues which will allow them to prevail in the matter under dispute. The very fact the special interest group has convinced the court to take the case indicates that group's notion of public policy has caught the court's attention and, perhaps, the court has allowed itself to become a vehicle or even a champion of the special interest group's view of public policy. (Jeremy Rabkin, *Judicial Compulsions: How Public Law Distorts Public Policy*, pp. 63-64, (1989).)<sup>12</sup> Rabkin states that permitting the special interest group lawsuits against administrative agencies is "essentially a means by which courts grant particular private advocates privileged claims on the conduct of public policy." Rabkin, *supra*, at 64.<sup>13</sup>

<sup>11</sup> The proper forum for special interest groups to demand attention for their agenda is through the more deliberate and democratic legislature.

<sup>12</sup> This Court has admonished the federal judiciary to refrain from such judicial activism. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

<sup>13</sup> In his dissent in *Burford I*, Circuit Judge Williams charged that

Further, Rabkin submits, when special interest groups are able to intimidate administrative agencies with threats of lawsuits, then the administrative agencies are inordinately influenced in their policy decisions by the promptings and complaints of these advocacy groups. And, if lawsuits proceed, then the advocacy groups can invoke legalistic rationales to protect their preferred policies from reconsideration or adjustment over time. (Rabkin, at 63-64 and 270.)

*Amicus Curiae* submits that the concerns expressed by Rabkin are very real. If NWF is successful in proceeding with this case, then the ability of the BLM to make judgments based on the many relevant policy considerations will be limited, with undue attention being given to NWF's view. The national policy to manage public lands in a manner which fosters the domestic mining industry is, thus, thwarted.

The existence of cases in which claims such as NWF's have been allowed to proceed without strict insistence on meeting the constitutional and traditional requirements for a "case or controversy"<sup>14</sup> does not force this Court or any federal court to further extend that ill-advised practice to the extent sought by NWF in this case.<sup>15</sup> Special interest

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undue influence for the environmentalists' agenda was the very result in this case:

The injunction . . . makes no effort to minimize the aggregate harm to the public interests in both environmental preservation and alternative activities: the district court has allowed environmental interests, however weak and however trivially they may be at risk as to particular tracts, to sweep the other interests off the board.

835 F.2d at 340 (App. 114a-115a).

<sup>14</sup> For example, the *United States v. SCRAP* case, *supra*.

<sup>15</sup> Some legal commentators have observed that the courts are taking a more critical look at standing cases. For example, see Alpert, *supra*, at 305.

groups may still, and properly should, pursue their agenda in the political realm of government.

This case exemplifies a third mischief that springs from involving the courts in the administration of governmental programs. Here, the already overburdened judiciary is being asked to assume an enormous and time-consuming task which, constitutionally, the judiciary should avoid. The task NWF asked the District Court to undertake was awesome. NWF's goal was not to challenge identified "wrongs," but, rather, was to have the Court perform the work of the BLM while wearing NWF-supplied blinders. Instead of selecting one or even several BLM classification or withdrawal decisions on land which it could precisely locate and for which it might produce an injured member who recreated on that land, NWF challenged the entire withdrawal review program by including hundreds of Federal Register notices of BLM actions (NWF's Amended Complaint, paragraph 18) and neither precisely located them for the Court (*Burford I* at 329 and 337; App. 89a-90a and 107a-108a), nor produced members who could claim injury. As the case progressed, NWF was forced to concede that some of the listed actions were environment enhancing even in NWF's view. (*Burford I* at 337; App. 108a). And as pointed out in the briefs filed by the Petitioners, the District Court had monumental difficulties during the period the preliminary injunction was in effect.<sup>18</sup>

And there is a fourth mischief in these suits that is particularly apparent in this case. Allowing an entire program to be challenged reduces, if not nullifies, the ability

<sup>18</sup> As noted at pages 7-8 of the Petition filed by the federal Petitioners in Docket 89-640, several modifications of the preliminary injunction were necessitated to limit its original scope. In at least one instance, NWF itself was constrained to ask for relief. Congress, at the behest of affected parties, legislated other limits on the effect of the preliminary injunction.

of third parties to conduct their business with the government. The mining industry is dependent on its statutory right to explore for and produce minerals on public lands. Until the industry knows reliably what will become of the BLM's classification and withdrawal review programs, the mining industry cannot risk the huge monetary investments necessary to conduct mining activities. If, as Congress has declared, the national policy favors an orderly domestic mining program, then the mining industry must be allowed to rely on governmental programs. (See the statement of the Court of Appeals quoted at footnote 4, *supra*, wherein that court recognized the disruption caused to the ability of third parties to conduct business.)

#### **B. NWF's Suit Fails Under the Most Liberal of Standing Cases.**

Standing jurisprudence is a highly case-specific endeavor, turning on the precise allegations of the parties seeking relief. *National Wildlife Federation v. Hodel*, 839 F.2d 694, 703-704 (D.C. Cir. 1988). The courts have developed guidelines for the case-by-case testing of standing issues. First, the suit must meet the "case or controversy" requirement of Article III of the Constitution. *Warth v. Seldin*, 422 U.S. 490 (1975); *NWF v. Hodel*, *supra*. Second, the suit must survive self-imposed "prudential limits" on the courts' powers. *Warth*, *supra*; *NWF v. Hodel*, *supra*.

Even though these same constitutional and prudential tests underlie virtually all the many federal court pronouncements on standing, the pronouncements are hard to reconcile. But, *Amicus Curiae* suggests, there is no need in this case to attempt to reconcile the "conservative" standing cases with the "liberal" ones. The Petitioners have pointed out in their briefs that NWF's showing of standing failed to meet even the most liberal of the standing decisions.

*Amicus Curiae*, however, wishes to bring to this Court's attention that there is a case, also decided by the

District of Columbia Circuit, which is substantively irreconcilable with the present case. See *Wilderness Society v. Griles*, 824 F.2d 4 (D.C. Cir. 1987). That case involved a challenge by the Wilderness Society and the Sierra Club to a BLM policy decision not to charge submerged lands against the grant of acreage entitlements for Alaska and Alaskan natives. In fact, *Griles* was decided by some of the same Circuit Judges who decided *Burford II*. In the *Griles* case, however, it was held that affidavits of Society members, in which it was claimed that the members visited federal lands throughout the State of Alaska, were *insufficient* to support standing. The Court of Appeals reasoned that members failed to name specific lands they intended to visit which lands would be taken out of federal ownership by the challenged BLM policy.

The very same flaw in standing proof defeats this case. NWF's member affidavits claimed nothing more specific than recreating "in the vicinity of" only some of the enormous expanses of federal land affected by this suit. They did not point to specific tracts which would be opened to other users, thereby injuring the members' enjoyment of the environment undisturbed. This Court is often asked to grant certiorari to resolve a conflict in decisions between Circuits. Here, certiorari should be granted to resolve a conflict within a Circuit.

Despite all the procedural entanglements and problems over what standard of review was to be applied at any particular stage of this case, what happened here is relatively simple: NWF tested the limits of a claim to standing. The District Court found that NWF pushed too far. The Court of Appeals, misled by a notion of law of the case, reversed. Unfortunately, in addition to announcing that the appeal was decided on the basis of law of the case, the Court of Appeals, in a published opinion, made lengthy comments to the effect that the Court would countenance standing proofs even as thin as NWF's. Even if these comments are viewed as *dicta*, they will necessarily confuse the law of standing. The wisdom of this Court is called upon to instruct

the Court of Appeals, and, indeed, all federal courts, that the courts of this nation should not be in the business of reviewing entire public programs, especially where the activities claimed by the plaintiff's members are located no more precisely than "in the vicinity" of a few of the huge tracts of federal land they seek to preserve.

The vastness of the public lands requires that direction for their management be provided initially by broad programs, such as the withdrawal review program, to be implemented by individual actions on specific land areas. If a party is injured by such a specific action, that party may have standing to seek redress in the courts for that action, but not for the entire program guiding other actions which do not affect that party.

**CONCLUSION**

The Petitions for Writ of Certiorari should be granted.

Respectfully submitted,

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December 1989

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No. 89-640

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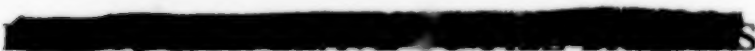
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JOSEPH F. SPANIOL, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1989

Manuel Lujan, Jr., Secretary of the Interior,  
*et al.*, *Petitioners*,  
v.  
National Wildlife Federation, *et al.*,  
*Respondents*.

On Petition For Writ of Certiorari to the  
United States Court of Appeals  
For the District of Columbia

S  
**AMICI CURIAE AND BRIEF OF AMICI CURIAE**  
NATIONAL CATTLEMEN'S ASSOCIATION, PUBLIC LANDS  
COUNCIL, AMERICAN SHEEP INDUSTRY ASSOCIATION,  
ROCKY MOUNTAIN OIL AND GAS ASSOCIATION, AND  
INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA  
IN SUPPORT OF PETITIONERS

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No. 89-640

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In The  
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Manuel Lujan, Jr., Secretary of the  
Interior, *et al.*, *Petitioners*,

v.

National Wildlife Federation, *et al.*,  
*Respondents*.

---

On Petition For Writ of Certiorari to the  
United States Court of Appeals  
For the District of Columbia

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MOTION OF NATIONAL CATTLEMEN'S ASSOCIATION,  
PUBLIC LANDS COUNCIL, AMERICAN SHEEP INDUSTRY  
ASSOCIATION, ROCKY MOUNTAIN OIL AND GAS  
ASSOCIATION, AND INDEPENDENT PETROLEUM ASSOCIATION  
OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICI*  
*CURIAE* IN SUPPORT OF PETITIONERS

---

Pursuant to this Court's Rule 42, the National Cattlemen's Association (NCA), Public Lands Council (PLC), American Sheep Industry Association (ASI), Rocky Mountain Oil and Gas Association (RMOGA), and the Independent Petroleum Association of America (IPAA) respectfully request the Court for leave to file the *amicus curiae* brief bound with this motion. Consent letters from Petitioners and Respondents accompany this filing.

The members of the *amici* organizations operate on or use resources from the public lands. Litigation concerning public land policies directly affects these members and *amici* can provide this Court with a unique perspective regarding the need for this Court to grant Petitioners petition for a writ of certiorari. Therefore, *amici* respectfully request that this Court grant the motion for leave to file this brief *amicus curiae*.

Respectfully submitted,

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No. 89-640

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In The  
**Supreme Court of the United States**

October Term, 1989

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Manuel Lujan, Jr., Secretary of the  
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v.

National Wildlife Federation, *et al.*,  
*Respondents*.

---

On Petition For Writ of Certiorari to the  
United States Court of Appeals  
For the District of Columbia

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BRIEF OF *AMICI CURIAE*  
NATIONAL CATTLEMEN'S ASSOCIATION, PUBLIC  
LANDS COUNCIL, AMERICAN SHEEP INDUSTRY  
ASSOCIATION, ROCKY MOUNTAIN OIL AND GAS ASSOCIATION,  
AND INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA  
IN SUPPORT OF PETITIONERS

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## INTEREST OF AMICI

*Amici curiae* are five organizations whose members are directly involved in the use and management of natural resources on public lands. The members of each organization are often affected by litigation to stop development or economic uses of lands.

*Amicus curiae* National Cattlemen's Association (NCA) is a non-profit trade association speaking on behalf of all segments of the nation's beef cattle industry. The membership represents approximately 230,000 professional cattlemen. The NCA's basic purpose is to provide the beef cattle industry with an organization through which members work collectively to protect their industry and to solve industry problems in the national economy. A number of NCA members use public land resources through livestock grazing leases or permits and water development. These NCA members play an active role in the management of these leases and permits.

*Amicus curiae* Public Lands Council (PLC) is a non-profit organization representing 27,000 members who hold leases and permits to graze domestic livestock on federal land. In the western states, the scarcity of undeveloped private land makes public land use, either by grazing lease or grazing permit, an essential part of the ranch unit. PLC members actively manage these leases and permits.

*Amicus curiae* American Sheep Industry Association (ASI) is a non-profit organization representing 115,000

producers of wool and lamb. The association represents its members in legislative and regulatory matters. Additionally, the ASI promotes marketing efforts with research, education, and communication activities. Many ASI members also operate on federal land under the authority of grazing leases or permits. ASI members also actively manage these leases or permits for production of forage for livestock and wildlife.

*Amicus curiae* Rocky Mountain Oil and Gas Association (RMOGA) is a trade association representing hundreds of oil and gas operators, large and small, who explore for and produce oil and natural gas throughout the Rocky Mountain states of North Dakota, Montana, Wyoming, Colorado, Utah, Nebraska, South Dakota, and Idaho. The high percentage of federal lands in RMOGA's region gives RMOGA members a serious interest in federal land management. Access to federal lands to drill for oil and natural gas is fundamental to the industry's willingness and ability to explore for and develop oil and gas reserves on federal lands. A significant number of RMOGA members explore for and produce oil and gas on federal leases.

*Amicus curiae* Independent Petroleum Association of America (IPAA) represents the interests of approximately 10,000 independent oil and gas producers in the lower 48 contiguous states. The independents drill more than 90% of the exploratory wells in untested areas of the United States, many of which are on federal land. IPAA members produce a third of the total output of crude oil and natural gas in the United States and--perhaps most important--make 80% of the sig-

nificant oil and natural gas discoveries in the United States. Access to federal land for exploration and development is also important to IPAA members.

*Amici curiae* have a direct interest in the question of whether an environmental group can prove standing on the basis of using the "vicinity of the area" that is the subject of the lawsuit. *Amici* members all rely on federal land resources for their livelihood. *Amici* have, in the past, suffered economic harm from lawsuits filed by environmental organizations attempting to prevent development, such as oil or natural gas drilling, by changing federal land policy. In order to defend the decisions made by federal agencies that were challenged in court, *amici* have had to intervene in these suits and to take other legal action.

This case involves how much of a personal stake in the controversy must advocacy organizations representing their members show before the issues can be addressed in federal court. Given the number of possible lawsuits and the resulting impact on public land management policy and future use of the public lands, this case is very important to *amici* members.

#### OPINIONS BELOW

The opinion of the court of appeals for the District of Columbia Circuit is reported at 878 F.2d 422. The opinion of the district court for the District of Columbia Circuit is reported at 699 F. Supp. 327. Prior opinions of the court of appeals for the District of Columbia Circuit are reported, respectively, at 835 F.2d 305 and

844 F.2d 889, while prior opinions of the district court for the District of Columbia Circuit are reported, respectively at 676 F. Supp. 371 and 676 F. Supp. 280.

### SUMMARY OF ARGUMENTS

1. The decision of the court of appeals reduces the showing of interest for standing to sue below the minimum required by the United States Constitution. By removing the requirements that an organization show that its members have a personal stake in this litigation, the court of appeals permits any member of the public to challenge agency decisions without any personal involvement. The federal courts will be required to adjudicate public policy issues that are best left to the Executive Branch or Congress, becoming just another forum for public debate.

2. This decision will likely interfere with a wide range of economic activities on federal land, because it permits open-ended litigation to stop development by organizations lacking any personal interest in the case. The erosion of the standing doctrine will encourage public land litigation to limit development, including livestock grazing and oil and gas drilling done by *amici*.

### STATEMENT OF THE CASE

*Amici* adopt the Petitioners' statement of the case and incorporate it herein by reference.

## REASONS FOR GRANTING THE PETITION

### I

#### THE DECISION OF THE COURT OF APPEALS ERODES PREVIOUS DECISIONS OF THIS COURT LIMITING JUDICIAL REVIEW OF AGENCY ACTION TO INSTANCES WHEN THE LITIGANT HAS A PERSONAL STAKE IN THE MATTER

This is a case involving the subject matter jurisdiction of the United States Federal Courts. The decision of the court of appeals has extended the possible interests that may have standing far beyond the limits framed by Constitutional and prudential standards established by this Court. This expansion will make the federal courts a forum for public policy debates over how the nation's public land should be used, without regard to whether the litigant has a real and personal stake in the controversy. The federal courts will thus intrude into matters already debated by the Executive Branch in violation of the tradition of separation of powers.

Article III of the Constitution establishes the jurisdiction of the courts by limiting "judicial Power. . . to all Cases [and]. . . Controversies." U.S. Const., art. III, § 2. The Administrative Procedure Act, 5 U.S.C. § 702, further limits the jurisdiction of the courts in determining disputes arising out of federal agencies to persons "suffering [a] legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute."

These limits on the power of the judiciary ensure that the courts are not asked to perform the functions of the Executive Branch or the Congress.

In *Valley Forge Christian College v. Americans United for the Separation of Church and State*, 454 U.S. 464, 472 (1982), this Court stated that "at an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" citing *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). In the context of public land litigation, the Court held that merely an *interest* in "conservation" is not sufficient to permit standing. *Sierra Club v. Morton*, 405 U.S. 727, 730 (1972). Instead, the plaintiff must be "directly harmed." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 685 (1973).

The Respondents filed this lawsuit to oppose Petitioners' decisions to permit a wider range of lawful uses, such as water projects and oil and gas drilling, on the lands managed by the Bureau of Land Management (BLM) or the Forest Service. Respondents brought this public policy dispute into the federal courts without ever showing that a single member actually used any part of the 180 million acres of land involved in the case and would be harmed by the Petitioners' actions. Instead, Respondents came forward with members who used land in "the vicinity of" two tracts of BLM land several million acres in size.

The decision of the court of appeals permits any organization to litigate public land policy issues on the basis that they use land "in the vicinity of" the area and that the nearby land might, at some future point in time, be developed. By sharply reducing the personal stake required to invoke the jurisdiction of the federal courts, the court of appeals ensures that the federal courts will be asked to resolve issues more appropriately left to the Executive Branch or Congress.

No case decided by this Court permits standing when the party alleges a general injury--such as an interest in the aesthetic and recreational use of land "in the vicinity" of the land actually affected by agency action. The affidavit filed in this case illustrates the lack of a personal stake and the possible problems that will arise if this decision is permitted to stand without review. One of Respondents' members claimed to use land "in the vicinity of" a 2 million acre tract of land.<sup>1</sup> Put into perspective, it would take one person more than 54 years to use the land described in the affidavit, if that individual used 100 acres a day for those 54 years. Given the number of acres involved, it is noteworthy that Respondents could not even show that any member ever used the land in question. Such a claimed basis for standing makes a mockery of the requirement

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<sup>1</sup> Respondent's member filed an affidavit stating that she used federal lands for recreation and aesthetic enjoyment - especially those "in the vicinity of" South Pass - Green Mountain, Wyoming." Pet. App. 3. The district court found that this area is 2 million acres and only 2,000 acres were recently opened to mineral development. Pet. App. 10.

for a concrete, definable, and individualized injury for standing.

The standing doctrine requires evidence of a personal stake in the case to ensure that the federal court only addresses a specific dispute rather than simply second-guessing agency policy. Here, the Respondents effectively ask the federal court to assume the role of Secretary of Interior and reverse the more than twelve hundred or so agency decisions made over several years' time. This sweeping remedy should not be considered without evidence that Respondents' members use of the land to be protected is more precise than "in the vicinity of." The decision contradicts long-standing principles established by this Court and will undoubtedly lead to confusion in future cases.

## II

### THE POSSIBLE INCREASE IN LAWSUITS TO STOP DEVELOPMENT ON PUBLIC LAND WILL ADVERSELY AFFECT *AMICI* AND OTHER DEVELOPMENT INTERESTS THAT RELY ON ACCESS TO FEDERAL LAND

This case is not the first nor will it be the last one filed by advocacy organizations to change the federal government's land management policies.<sup>2</sup> The number

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<sup>2</sup> Many such cases have directly affected how NCA, PLC, ASI, RMOGA, and IPAA members do business. In *NRDC* (continued...)

of these cases and the potential to do economic harm makes it imperative that these "representational" lawsuits involve real controversies and real people. The Constitutional requirements of standing are an important way to ensure that litigation does not simply repeat the public policy debates that occurred in the Department of Interior or the Forest Service before the agency decision was made.<sup>3</sup>

The use of public land in livestock grazing, timber harvest, mineral development, and skiing dominates the economies of most western states.<sup>4</sup> *Amici* represent

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<sup>2</sup>(...continued)

*v. Hodel*, 618 F. Supp. 848 (E.D. Cal. 1985), the district court set aside the cooperative grazing allotment management program under which many NCA, PLC and ASI members had signed agreements. In *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), the district court set aside the Forest Service's decision to issue leases and enjoined all development. Many RMOGA and IPAA members had leases that were challenged.

<sup>3</sup> Public participation occurs in a number of different proceedings: rulemaking, 43 U.S.C. § 1740, 16 U.S.C. § 1613, and 5 U.S.C. § 503, land use planning process, 43 U.S.C. § 1712(f); 16 U.S.C. § 1604(d), and under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, 40 C.F.R. § 1506.

<sup>4</sup> Under the Twenty-five Percent Act, all of the western states receive 25% of the revenues from National Forest land. 16 U.S.C. § 500. These revenues are from ski areas, timber sales, livestock grazing fees, and other revenue generating activities. Under the Federal Onshore Oil and Gas Leasing (continued...)

the agriculture and oil and gas industries. *Amici* members have often been affected by litigation challenging the agency decisions that enable a rancher to use federal land to graze his livestock, to build a water project, or that permit a company to drill for oil or natural gas.<sup>5</sup> Judge Williams in his dissent to an earlier opinion of the Court of Appeals in this case acknowledged the severe impacts of the preliminary injunction. "For commercial interest holders, an investment is tied up for an indefinite period, all chance of any return denied. Cf. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987)."

*Amici* believe that such litigation is not appropriate as another form of public participation, unless actual persons are adversely affected. *Amici* must establish

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<sup>4</sup>(...continued)

Reform Act, 30 U.S.C. § 191, 50% of the revenues from oil and gas leases on National Forest and BLM land are returned to the state. Federal lease revenues play a critical role in state and local government finances, especially in Wyoming, New Mexico, and Montana.

<sup>5</sup> In *NRDC v. Morton*, 388 F. Supp. 829 (D.D.C. 1974), *aff'd* 527 F.2d 1386 (D.C. Cir.) *cert. denied* 427 U.S. 913 (1975) the district court changed livestock grazing and retained supervisory jurisdiction when it held that an environmental impact statement was required. See also *Sierra Club v. Watt*, 608 F. Supp. 305 (E.D.Cal. 1985) (setting aside the wilderness study area changes made by the Secretary of the Department of Interior and enjoining development inconsistent with wilderness study.); *NRDC v. Hughes*, 454 F. Supp. 148 (D.D.C. 1978) (enjoining coal leasing on federal lands until programmatic environmental impact statement is prepared).

their injury when they file suit. It is equally appropriate that environmental organizations carry the same burden of proving a personal stake in the agency decision to be contested. Unless the traditional standards for standing to sue are retained by granting review of this case, *Amici* are concerned that there will be no limits on the number and kind of lawsuits brought. Moreover, the federal courts will be converted into another forum for public participation, a role they are ill-equipped to play. *Amici* respectfully urge this Court to grant review.

## CONCLUSION

"Standing differs from the other elements of justiciability in that it focuses primarily on the status of the litigant, and only secondarily on the issues he wishes to have adjudicated." *Americans United for Separation of Church and State v. United States Department of Health, Education and Welfare*, 619 F.2d 252, 254-55 (1980). As stated in *United States ex rel. Chapman v. Federal Power Comm.*, 345 U.S. 153, 156 (1953), standing doctrines have been "more or less determined by the specific circumstances of individual situations." Here the Court has been presented with a situation where the law of standing needs to be further clarified.

Respectfully submitted,

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tion, and Independent Petroleum  
Association of America,*

MOTION FILED  
DEC 8 1989

In The  
**Supreme Court of the United States**  
October Term, 1989

MOUNTAIN STATES LEGAL FOUNDATION, *et al.*,  
*Petitioners,*

v.

NATIONAL WILDLIFE FEDERATION,  
*Respondent.*

and

MANUEL LUJAN, JR., *et al.*,  
*Petitioners,*

v.

NATIONAL WILDLIFE FEDERATION,  
*Respondent.*

On Petition For A Writ Of Certiorari To The  
United States Court Of Appeals For The  
District Of Columbia Circuit

**MOTION FOR LEAVE TO FILE BRIEF AND  
BRIEF AMICUS CURIAE OF AMERICAN FARM  
BUREAU FEDERATION AND WYOMING FARM  
BUREAU FEDERATION IN SUPPORT  
OF PETITIONERS**

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14 pp

Nos. 89-628 & 89-640

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In The  
**Supreme Court of the United States**  
October Term, 1989

---

MOUNTAIN STATES LEGAL FOUNDATION, *et al.*,  
*Petitioners,*

v.

NATIONAL WILDLIFE FEDERATION,  
*Respondent.*

and

MANUEL LUJAN, JR., *et al.*,  
*Petitioners,*

v.

NATIONAL WILDLIFE FEDERATION,  
*Respondent.*

---

**On Petition For A Writ Of Certiorari To The  
United States Court Of Appeals For The  
District Of Columbia Circuit**

---

**MOTION FOR LEAVE TO FILE BRIEF  
AMICUS CURIAE**

---

The American Farm Bureau Federation (AFBF) and  
Wyoming Farm Bureau Federation (WYFB) hereby

respectfully move to file the attached brief *amicus curiae* in support of Mountain States Legal Foundation and Manuel Lujan petitioners for *certiorari* in the above captioned case. The consents of the attorneys for the petitioners have been obtained. The consent of the attorney for the respondent was requested but denied.

The interest of the Farm Bureau in this case arises from the fact that many Farm Bureau members in the western states are adversely affected by restrictions on land managers imposed in the case at bar. Additionally, Farm Bureau members have been adversely impacted by litigation challenging government programs and policies in other areas including public land grazing administration, agricultural chemical regulation and water regulation.

The AFBF is the largest general farm organization in the United States. It has member state organizations in all 50 states (including Wyoming) and Puerto Rico, representing the interests of more than 3.6 million member families. The interests of AFBF and WYFB should be considered by this Court in making the decision to grant the petitioned writ.

Respectfully submitted,

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November 1989

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Nos. 89-628 &amp; 89-640

In The

## Supreme Court of the United States

October Term, 1989

MOUNTAIN STATES LEGAL FOUNDATION, *et al.*,  
Petitioners,

v.

NATIONAL WILDLIFE FEDERATION,

Respondent.

and

MANUEL LUJAN, JR., *et al.*,

Petitioners,

v.

NATIONAL WILDLIFE FEDERATION,

Respondent.

On Petition For A Writ Of Certiorari To The  
United States Court Of Appeals For The  
District Of Columbia Circuit

BRIEF AMICUS CURIAE OF AMERICAN FARM  
BUREAU FEDERATION AND WYOMING FARM  
BUREAU FEDERATION IN SUPPORT  
OF PETITIONERS

The American Farm Bureau Federation and Wyoming  
Farm Bureau Federation respectfully submit this brief

*amicus curiae* in support of Mountain States Legal Foundation and Manuel Lujan, petitioners for *certiorari*.

---

### INTEREST OF AMICUS CURIAE

1. The American Farm Bureau Federation (AFBF) of Park Ridge, Illinois is a nonprofit general farm organization incorporated pursuant to the laws of the State of Illinois. Its purposes are to promote, protect and represent the economic, social and educational interests of farmers and ranchers across the country. The largest general farm organization in the United States, AFBF, has member state organizations in all 50 states (including Wyoming) and Puerto Rico, representing the interests of more than 3.6 million member families.

2. The Wyoming Farm Bureau Federation (WYFB) is a voluntary, non-profit, general farm organization incorporated under the laws of the State of Wyoming, representing more than 8,000 families. Its purpose is to represent, service and protect the interests and rights of farmers and ranchers in Wyoming.

3. Farm Bureau members have a direct and vital interest in the outcome of this case. The orderly management and use of federal lands, especially in the western region of the United States, is of paramount importance to member farmers and ranchers whose private lands lie adjacent to and are often tied economically to such federal lands.

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### STATEMENT OF THE CASE

*Amicus Curiae* adopts petitioners' statements of the case.

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### REASONS FOR GRANTING THE WRIT

#### I. THE COURT OF APPEALS' STANDING RULE ALLOWS SERIOUS DISRUPTION OF GOVERNMENT PROGRAMS UPON WHICH FARM BUREAU MEMBERS MUST RELY

The Court of Appeals' decision is the latest of a long series of suits in which parties with the slightest interest in a problem claim standing to judicially challenge far reaching government programs. The result has been serious disruption and potential devastation for those that rely on the programs.

Of major importance to the Farm Bureau's Western Region members is the public lands grazing program. For generations families have built ranches around the right and ability to graze cattle on the federal lands. Unfortunately, because of continued federal administrative control of those grazing rights, the very right of western ranchers to hold the grazing rights – and thus continue their livelihoods – has been subjected to judicial review at the behest of special interest litigating groups. In the case at bar, standing has been based on the slightest aesthetic interest in the federal lands.

For example, the Natural Resources Defense Council (NRDC) sued in the Eastern District of California to set aside the Bureau of Land Management's Experimental

Range Stewardship Program. *Natural Resources Defense Council, Inc., v. Hodel*, No. Civ. S-84-616 (E.D. Cal. Sept. 3, 1985). By using an extremely narrow construction of the Public Rangeland Improvement Act, 43 U.S.C §§ 1901-1908 (1982), the court struck down a program designed to use incentives to improve range conditions. The Farm Bureau respectfully submits that it is not appropriate for single issue plaintiffs to be granted standing to attack an experimental program designed to better the efficiency of Executive branch management.<sup>1</sup>

If the court had enforced the rule that programs are not justiciable, then BLM may have been able to develop a better range management system. Instead, the court presumed the failure of the BLM's program and dictated the content of the program to the agency. Moreover, such judicially dictated policy ultimately frustrates the policy of Congress to improve grazing conditions. See Huffaker and Gardner, *Rancher Stewardship on Public Ranges: A Recent Court Decision*, 27 NAT. RES. J. 887 (1987) (describing the deleterious effect of judicial intervention in this program).

The NRDC again sued in the Eastern District of California<sup>2</sup> to set aside an executive order setting grazing fees

<sup>1</sup> Authority for the stewardship program is found at 43 U.S.C. § 1908 (1982).

<sup>2</sup> The above two cases are not the only ones brought in the Eastern District of California. *Sierra Club v. Watt*, 608 F. Supp. 305 (E.D. Cal. 1985), set aside an important wilderness study program of the Department of the Interior.

for all the public lands.<sup>3</sup> *Natural Resources Defense Council v. Hodel*, No. Civ. S-86-548 (E.D. Cal.). The injury claimed for standing was aesthetic damage caused by a chain of events that allegedly resulted from fees that the NRDC claimed were too low. The court was presented with thousands of pages of economic and technical data and asked to decide the fate of the public lands grazing program, and the court asserted its authority to do so. Ranch families across the West must not live in fear of economic ruination at the hands of single interest claimants who have no economic risk or loss of property rights at stake.

Grazing and grazing fee issues are properly before Congress and congressional oversight committees. The agencies have thousand of personnel to manage the grazing program. Both of these branches of government are ultimately responsible to the public. The environmental groups and the members of the Farm Bureau are constantly arguing their points to these co-equal branches of government. The process is a slow one, as it should be since the survival of western ranch families is at stake. This program has been authorized, funded, and overseen by Congress. The Executive is responsible for administration. There is no need for reshaping by litigation only to accommodate the policy goals of environmental litigants.

Registration and de-registration of agriculture chemicals is of great importance to Farm Bureau members throughout the United States. America's farmers are

<sup>3</sup> Grazing fees are the rentals charged for grazing on the public lands.

proud of their role in providing abundant and wholesome food for the nation and the world. The chemicals that have played an important role in agriculture cannot be removed or restricted from the market lightly. Both Congress and the Executive have processes whereby those concerned about chemicals can air their concerns and receive appropriate action. Again, the judiciary should not be called upon repeatedly to decide such technical and politically charged questions asserted by environmental litigants.

Yet the judiciary has played a major role – perhaps *the* major role – in shaping the agriculture chemical policies and programs of the Executive. A commentary describes how a series of court decisions rewrote the procedural provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1982), so as to define the substantive content of the program. MacIntyre, *A Court Quietly Rewrote the Federal Pesticide Statute: How Prevalent Is Judicial Statutory Revision?*, 7 LAW & POLICY 249 (1985).

Standing for pesticide cases is in reality based on a harm to the public at large. Such harm is at least as diffuse as the theoretical harm to respondent's member Ms. Peterson in the case at bar. Ms. Peterson might have her aesthetic appreciation of 5,000 acres in Wyoming injured if someone decides to mine there. Likewise, a plaintiff in a pesticide case might contract cancer thirty years from now. Both of these harms are more akin to the injury to taxpayers where this Court has long denied standing. *Frothingham v. Mellon*, 262 U.S. 447 (1923). As in taxpayer cases, this Court should defer to the elected branches of government.

## II. FARM BUREAU MEMBERS WHO ARE NEIGHBORS TO THE PUBLIC LANDS ARE DIRECTLY AND ADVERSELY AFFECTED BY THIS SUIT

Apart from the far reaching implications to major government programs upon which Farm Bureau members must rely, this suit directly affects many Farm Bureau members. Many of the western members of the Farm Bureau are neighbors to the public lands. Often historic land ownership patterns have evolved in ways that are inefficient for both the federal land management agencies and the neighboring farms and ranches. To increase efficiency of both public land and private lands, federal land managers and neighboring private owners frequently trade land.

By allowing this suit to be heard, the court placed many completed trades in jeopardy and blocked many others during the time a preliminary injunction was in place. Even now, those trading land must worry that the court or agencies will undo land exchanges.<sup>4</sup>

Hundreds, or perhaps thousands, of land exchanges were blocked on the 180,000,000 acres of federal land involved in this suit.<sup>5</sup> Almost all of those exchanges were

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<sup>4</sup> Section 10 of the Federal Land Exchange Facilitation Act, Pub. L. 100-409, 102 Stat. 1087 (1988) (codified at 43 U.S.C. § 1723 may provide some relief for a few larger future exchanges.

<sup>5</sup> It is impossible to determine the number since many potential applicants were told orally that exchange was impossible on affected lands.

benign to the respondent. Many exchanges, such as those to enhance wildlife habitat, were beneficial to the respondent. The judiciary should not be called upon to block exchanges in all western states based on one person's objection to possible mining damage in one 5,000 acre area in Wyoming.

Land exchanges, and many of the other routine day to day management concerns on the 180,000,000 acres can only rationally be handled by the Executive branch which has the knowledge and staff to handle the thousands of matters that arise. The judicial management of the lands in the case at bar has caused widespread interference with the day to day business relations of Farm Bureau members and federal land managers.

---

### CONCLUSION

The founding fathers wisely assigned policy-making to the Legislative and Executive branches of government. The Executive is intended to have flexibility to efficiently execute the laws Congress passes. The Constitution restricts the Judiciary to resolving actual cases and controversies. Over the past decades the Judiciary has lost sight of this restriction and judicial policy making has seriously impacted the federal programs upon which Farm Bureau members rely. Judicially created policies have hurt farmers in their legitimate use of the public

lands, regulated chemicals, regulated waters, and numerous other objects of government regulation.<sup>6</sup>

The Farm Bureaus urge this Court to grant the writ and examine the role of the judiciary to review programs and policies of federal agencies.

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November 1989

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<sup>6</sup> The great importance of the issue raised in this case to many areas of government and society is set forth at length in J. RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY (1989).

No. 89-640

Supreme Court, U.S.  
FILED  
MAR 2 1990  
JOSEPH F. SPANIO, JR.

# In the Supreme Court of the United States

OCTOBER TERM, 1989

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,  
ET AL., PETITIONERS

v.

NATIONAL WILDLIFE FEDERATION, ET AL.

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI  
FILED OCTOBER 18, 1989  
CERTIORARI GRANTED JANUARY 16, 1990

# In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-540

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,  
ET AL., PETITIONERS

v.

NATIONAL WILDLIFE FEDERATION, ET AL.

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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85-2238

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NATIONAL WILDLIFE FEDERATION

v.

BURFORD, ET AL.

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RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
7/15/85	1	COMPLAINT; * * *.
7/15/85	2	MOTION of pltf for preliminary injunction; * * *.
8/19/85	7	AMENDED COMPLAINT.
9/16/85	23	ORDER permitting the Mountain States Legal Foundation and the Minerals Exploration Coalition, Inc. to intervene as party defts.
12/4/85	50	ORDER granting pltf.'s motion for a preliminary injunction; enjoining defts. from taking certain action; enjoining certain persons holding interests in lands that were the subject of Classification terminations or withdrawal revocations since 1-1-81 from taking certain action; directing defts. to publish this order in the Federal Register; directing pltf. to post security in the amount of one Hundred dollars (\$100); * * *.

DATE	NR	PROCEEDINGS
12/4/85	51	ORDER denying defts.' motion to dismiss.
12/4/85	52	ORDER granting the motion to intervene of Congressman Sieberling.
12/16/85	56	MOTION by deft-intervenors Mountain States Legal Foundation, et al. for reconsideration of preliminary injunction, and denial of motion to dismiss, or in the alternative, to amend the judgment to certify the issue of non joinder to the Court of Appeals under 28 U.S.C. § 1292(b).
12/16/85	59	MOTION by defts. to amend, Reconsider and Clarify the Court's Order of 12/4/85.
2/10/86	84	ORDER denying the motions by the federal defts. and by deft.-intervenor Mountain States Legal Foundation for reconsideration, and by deft.-intervenor to amend the judgment to certify the issue to the Court of Appeals.
2/10/86	86	ORDER granting pltf's motion for a preliminary injunction; enjoining defts. from taking certain action; directing publication of this order in the Federal Register; setting injunction security in the amount of \$100.00 * * *.
3/7/86	101	ORDER filed 3/6/86 granting the motion to intervene of the Trust for Public Land for the limited purpose of determining whether proposed land

DATE	NR	PROCEEDINGS
		exchange is prohibited under Court's order of 2-10-86; directing that the federal defts. issuance of a patent with respect to the land exchange is not exempt under terms of the order.
4/11/86	113	NOTICE of appeal by Mountain States Legal Foundation from order entered 2/10/86; * * *.
4/11/86	114	NOTICE of appeal by Federal deft. from order entered 2/10/86; * * *.
4/14/86	116	ANSWER of deft-intervenors Mountain States Legal Foundation and Mineral Exploration Coalition, Inc., to plffs amended complaint for Declaratory and Injunctive relief.
4/15/86	119	ORDER filed 4/14/86 granting the Trust for Public Lands intervention for the full course of this proceeding.
4/16/86	120	ANSWER by defts. to complaint of John F. Seiberling, pltf-intervenor.
4/16/86	121	ANSWER by defts. to plffs amended complaint.
5/16/86	143	ANSWERS by pltf. to deft-intervenors first set of interrogatories (resubmitted); Declaration of Lynn A. Greenwalt; * * *.
5/22/86	146	NOTICE by pltf. of filing; affidavits of Peggy Kay Peterson and Richard Loren Erman.
5/23/86	149	ORDER filed 5/22/86 denying the motions for stay of the preliminary injunction.

DATE	NR	PROCEEDINGS
6/9/86	151	NOTICE by deft to take the deposition of Richard L. Erman.
6/9/86	152	NOTICE by deft to take the deposition of Lynn A. Greenwalt.
6/9/86	153	NOTICE by deft to take the deposition of Peggy K. Peterson.
6/23/86	165	MOTION by pltf. for summary judgment; * * *.
7/1/86	167	MOTION by pltf. to quash and for a protective order; * * *.
7/15/86	178	ORDER filed 7/14/86 granting pltf's motion to quash and for a protective order.
9/5/86	197	MOTION by depts-intervenors' to dismiss or alternatively for judgment on the pleadings; * * *.
9/12/86	206	MOTION by depts for summary judgment and/or for dissolution of the preliminary injunction issued 2/10/86; memorandum in opposition to pltf's motion for summary judgment and in support of deft's motion for summary judgment; * * *.
11/26/86	228	ORDER filed 11/25/86 amending this Court's Order of February 10, 1986, to add a new subparagraph (f) to paragraph 3 of that Order.
12/31/86	233	ORDER directing that the preliminary injunction entered on 12/4/85 as amended on 2/10/86 does not apply to the Geothermal Operations of California Energy Co. Inc; the Bureau of

DATE	NR	PROCEEDINGS
		Land Management shall forthwith vacate and set aside its suspension order of 4/22/86.
1/6/87	236	ORDER that the preliminary injunction entered on 12-4-85, as amended on 2/10/86 does not apply to the Geothermal operations of the Dept. of Water and Power for the City of LA; The Bureau of Land Management shall forthwith vacate and set aside its suspension order of 4-22-86.
1/6/87	237	MEMORANDUM ORDER denying LADWP's motion for declaratory and other relief regarding the Haiwee/Franklin land exchange.
6/3/87	246	ORDER (filed 6/2/87) directing that Congressman Bruce F. Vento, Chairman of the Subcommittee on National Parks and Public Lands, is substituted as pltf-intervenor in this action; * * *.
4/11/88	252	ORDER filed 4/8/88 granting motion of deft's to amend the court's order of 2/10/86, as amended by the court's order of 11/25/86; directing that subparagraph (f) of para 3 of the court's order of 2/19/86, as amended by the court's order of 11/25/86 is amended to read; (3) nothing in this order shall be construed to prohibit or affect: (f) the Secretary of Interior or his designee(s) from complying with the statutory obligations imposed on him by Sec. 3 of Pub. L. No. 99-542

DATE	NR	PROCEEDINGS
		(10/27/86), sec. 104 of Pub L. No. 99-950 (10/30/86), Sections 4(a), 4(b), 6 and 7 of Pub. L. No. 99-632 (11/7/86), Section 12(h) of Pub. L. No. 99-606 (11/6/86) and the last two unnumbered paragraphs under the heading of "Administrative Provisions" in that portion of House Joint Resolution 395, Pub. L. No. 100-202, containing the 1988 Fiscal year appropriations for the Bureau of Land Management.
4/29/88	253	CERTIFIED copy of Judgment from USCA dated 12-11-87 Affirming Judgment of USDC.
7/29/88	274	ORDER filed 7/28/88 that plft. file any opposition to defts' supplemental memorandum in support of their motion for summary judgment by 8/1/88; pltf. to file by 8/22/88 supplemental memorandum regarding the issue of its standing to proceed; defts. and intervenors opposition to be filed by 9/1/88; pltf's. response to be filed by 9/14/88.
8/22/88	278	STATEMENT by pltf. of P&A's in support of its standing to proceed; attachment.
11/8/88	303	ORDER filed 11/4/88 vacating the court's granting of preliminary injunction; granting motion of defendant's for summary judgment; case dismissed.

DATE	NR	PROCEEDINGS
11/14/88	304	NOTICE OF APPEAL by plaintiff National Wildlife Federation from order entered 11/8/88.
12/22/88	313	NOTICE OF APPEAL by pltf-intervenor CONGRESSMAN BRUCE F. VENTO from order entered on 11/8/88;
12/6/88	322	CERTIFIED copy of Judgment from USCA dated 6/20/89 REVERSING Judgment of USDC and REMANDING case to USDC for further proceedings in accordance with the Opinion.

UNITED STATES COURT OF APPEALS  
FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

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86-5239

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NATIONAL WILDLIFE FEDERATION

v.

ROBERT F. BURFORD, ET AL., APPELLANTS

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RELEVANT DOCKET ENTRIES

DATE	FILING - PROCEEDINGS
4/24/86	Copy of notice of appeal and docket entries from Clerk, DC.
12/11/87	Opinion for the Court filed by Circuit Judge Mikva.
12/11/87	Opinion concurring in part and dissenting in part filed by Circuit Judge Williams.
12/11/87	Judgment by this Court that the judgment of the District Court appealed from in these causes is hereby affirmed, in accordance with Opinion for the court filed herein date.
4/29/88	Per Curiam order denying petitions for rehearing, with memorandum attached.

UNITED STATES COURT OF APPEALS  
FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

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88-5397

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NATIONAL WILDLIFE FEDERATION

v.

ROBERT F. BURFORD, ET AL., APPELLANTS

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RELEVANT DOCKET ENTRIES

DATE	FILING - PROCEEDINGS
12/02/88	Copy of notice of appeal and docket entries from Clerk, Dist. Ct.
6/20/89	Opinion for the Court filed by Circuit Judge Edwards.
6/20/89	Judgment by this Court that the judgment of the district court appealed from in this matter is reversed and the case is remanded, in accordance with the Opinion for the Court filed herein this date.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION,  
1412 16TH STREET, N.W.,  
WASHINGTON, D.C. 20036  
(202) 797-6800, PLAINTIFF

v.

ROBERT F. BURFORD,  
DIRECTOR, BUREAU OF LAND MANAGEMENT,  
UNITED STATES DEPARTMENT OF THE INTERIOR,  
18TH AND C STREETS, N.W.,  
WASHINGTON, D.C. 20240  
(202) 343-1100,  
  
DONALD P. HODEL,  
SECRETARY OF THE INTERIOR,  
UNITED STATES DEPARTMENT OF THE INTERIOR  
18TH AND C STREETS, N.W.,  
WASHINGTON, D.C. 20240  
(202) 343-1100,

AND

UNITED STATES DEPARTMENT OF THE INTERIOR  
18TH AND C STREETS, N.W.,  
WASHINGTON, D.C. 20240  
(202) 343-1100, DEFENDANTS

[Filed Aug. 19, 1985]

AMENDED COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF

INTRODUCTION

1. This case challenges the Department of the Interior's conduct of its "land withdrawal review program." Under that program, the defendants have revoked withdrawals involving over 170 million acres of public lands. Another 50 million acres remain to be reviewed. This suit alleges, among other things, that the defendant's land withdrawal review program unlawfully fails to require analysis of proposed withdrawal revocations in land use plans and environmental impact statements, is being conducted without regulations, fails to provide for public participation in decision-making, and fails to provide for Congressional and Presidential review of proposed withdrawal revocations.

2. This suit is brought under provisions of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*; the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701 *et seq.*; and the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

JURISDICTION

3. This Court has jurisdiction of this action under 28 U.S.C. § 1331(a) (federal question jurisdiction) and 28 U.S.C. § 1346 (suits against agencies and officers of the United States).

4. The claims raised in this suit arise under provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 *et seq.*; the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 *et seq.*; and the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq.* The relief sought is authorized by 28 U.S.C. § 2201 (declaratory judgments) and 28 U.S.C. § 2202 (injunctive relief). Venue is proper in this Court under 28 U.S.C.

§ 1391(e). There is a present and actual controversy between the parties to this action.

#### PARTIES

5. Plaintiff National Wildlife Federation (NWF) has over 4.5 million members and supporters and is the nation's largest non-profit private conservation organization. Incorporated under the laws of the District of Columbia in 1939, NWF is dedicated to the wise use and management of the nation's natural resources. NWF has affiliate organizations and individual members in each of the 50 states and the District of Columbia.

6. NWF and its members are suffering and will continue to suffer injury in fact as a result of the challenged actions. Members of NWF use and enjoy the environmental resources that will be adversely affected by the challenged actions. They regularly use these resources for fishing, hunting, bird and wildlife watching, canoeing and boating, hiking, camping, and other similar activities. These persons' use and enjoyment of these resources will be irreparably injured if the defendants are permitted to terminate protective land use restrictions and thereby open up public lands to exploration, development, and disposal, without the development of land use plans, without prior preparation of adequate environmental impact statements, and without compliance with applicable laws, regulations, and procedures. Among other things, the challenged actions will adversely affect plaintiff and its members by destroying fish and wildlife habitat, and by impairing natural beauty. Further, NWF and its members suffer injury in that they have been and continue to be denied information on the potential impacts of, and alternatives to, defendants' actions and have been denied the opportunity to participate in defendants' decision-making. Further NWF and its members have

suffered injury by reason of their elected representatives, including the President of the United States and members of Congress, having been denied the opportunity and responsibility to participate in defendants' decision-making.

7. Plaintiff and its members are within the zone of interests sought to be protected by the Federal Land Policy and Management Act, the National Environmental Policy Act, and the Administrative Procedure Act.

8. Defendant, Donald P. Hodel is the Secretary of defendant United States Department of the Interior and is charged by law and regulations with the responsibility of administering and enforcing the Federal Land Policy and Management Act and complying with the provisions of the National Environmental Policy Act and the Administrative Procedure Act. He is sued in his official capacity.

9. Defendant Robert F. Burford is the Director of the Bureau of Land Management. Defendant Burford is charged by law and regulations with the responsibility for managing the public lands in compliance with the Federal Land Policy and Management Act, the National Environmental Policy Act, and the Administrative Procedure Act. He is sued in his official capacity.

10. Defendant, United States Department of the Interior, including therein the Bureau of Land Management, is a department and agency of the United States.

11. Plaintiff has made several attempts to resolve the claims raised in this Complaint. On August 14, 1984, plaintiff delivered a letter to Secretary Clark setting forth plaintiff's claims. On January 29, 1985, plaintiff delivered a letter to defendant Hodel substantially setting forth these claims again. On April 2, 1985, plaintiff delivered a letter to defendant Burford setting forth these same claims in additional detail. On April 22, 1985, representatives of the plaintiff met with defendant Burford and members of his staff to discuss these claims. Additional meetings between

representatives of both plaintiff and defendants were held on June 5, 1985, and June 19, 1985. Considerable correspondence has been exchanged between the parties. However, no resolution of this case has been achieved as a result of these efforts.

#### THE WITHDRAWAL REVIEW PROGRAM

12. Land classifications created under the now expired Classification and Multiple Use Act, 43 U.S.C. §§ 1411 *et seq.* (1964), and other federal statutes protect substantial areas of public lands from various types of commercial use and disposal. These land classifications have been included in defendants [sic] land withdrawal review program as they are "withdrawals" within the meaning of Section 103(j) of the Federal Land Management and Policy Act, 43 U.S.C. § 1702(j).

13. Similarly, other land withdrawals created by administrative action segregate areas of public land for some uses and prohibit others. These, too, have been included in defendants' land withdrawal review program as provided in Section 204(a) and (f) of FLPMA, 43 U.S.C. § 1714(a) and (f).

14. Section 701(c) of the Federal Land Policy and Management Act provides that all land withdrawals and land classifications "in effect as of the date of approval of this Act shall remain in full force and effect until modified under the provisions of this Act. . . ." 43 U.S.C. § 1701(c). Sometime after the passage of FLPMA, defendants created a Withdrawal Review Program. The purpose of this program is to review and eliminate use restrictions which limit access to public lands, including land withdrawals and land classifications.

15. Under the Withdrawal Review Program, defendants have terminated and continue to terminate land classifi-

cations affecting million [sic] acres of public lands. As of May 1985, land classifications on 152.9 million acres of public lands had been terminated by the defendants.

16. Under the Withdrawal Review Program, defendants have terminated and continue to terminate other land withdrawals affecting millions of acres of public lands. As of May 1985, defendants had terminated such land withdrawals on 20.6 million acres.

17. As of May 1985, defendants have submitted to the Office of Management and Budget recommendations for additional withdrawal revocations on public lands totalling 34 million acres. As of May 1985, approximately 15 million additional acres remain to be reviewed under the Land Withdrawal Review Program.

18. Attached to this Complaint as Exhibit A is a list of 788 land status actions, including terminations of land classifications and other land withdrawals, taken by defendants since January 1, 1981. This list is not intended to be inclusive. Upon information and belief, defendants have taken other such land status actions pursuant to the Withdrawal Review Program or other programs and continue to take such actions.

#### COUNT I

19. Pursuant to Section 202 of the Federal Land Policy and Management Act, land use plans *shall* be developed for the public lands. 43 U.S.C. § 1712. Pursuant to regulations contained at 43 C.F.R. 1600, the land use plan to be developed pursuant to the Act is a "Resource Management Plan."

20. Defendants have completed Resource Management Plans for only 9 of more than 200 identified resource areas on the public lands.

21. The land use status actions enumerated in Exhibit A were completed without prior preparation of the land use plans required by FLPMA.

22. On information and belief, other land withdrawals, including land classifications, have been terminated by defendants without prior preparation of the land use plans required by FLPMA.

23. Defendants' failure to prepare Resource Management Plans prior to commencement of the land status actions enumerated in Exhibit A, or other terminations of land withdrawals, including land classifications, is a violation of defendants' duties under Sections 102(a)(3), 202(d) and 701(c) of the Federal Land Policy and Management Act (43 U.S.C. §§ 1701(a)(3), 1712(d), 1701(c)), and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 706(2).

#### COUNT II

24. Section 204(f) of the Federal Land Policy and Management Act provides that the defendants shall review land withdrawals existing in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming, determine whether continuation of these withdrawals is appropriate, and then report these recommendations to the President and, through the President, to the Congress.

25. Defendants have completed the land status actions enumerated in Exhibit A without prior submission of a recommendation to the President or the Congress.

26. Upon information and belief, defendants have terminated land withdrawals, including land classifications, other than those listed in Exhibit A, on lands within the western states enumerated in Section 204(f), without prior submission of a recommendation to the President or the Congress.

27. Defendants' failure to submit a recommendation to the President and the Congress prior to taking the land status actions enumerated in Exhibit A or other terminations of land classifications or land withdrawals is a violation of defendants' duties under Sections 204(f) and 701(c) of the Federal Land Policy and Management Act (43 U.S.C. §§ 1714(f), 1701(c)), and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 706(2).

#### COUNT III

28. Pursuant to Section 302 of the Federal Land Policy and Management Act, defendants are required to manage the public lands according to principles of multiple use and sustained yield.

29. "Multiple use" is defined by Section 103(c) of the Federal Land Policy and Management Act (43 U.S.C. § 1702(c)) to mean:

a combination of balanced and diverse resources uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output,

including "the use of some land for less than all of the resources."

30. The Withdrawal Review Program emphasizes the availability of public lands for limited purposes, including mineral exploration and development, rather than multiple use as defined by the Act. In reliance on this program, defendants have opened millions of acres of public lands to mineral exploration and development.

31. Defendants' failure to adequately consider multiple uses of the lands reviewed under the Withdrawal Review Program constitutes a violation of defendants' duties under Sections 102(a)(7) and 302 of the Federal Land Policy and Management Act (43 U.S.C. §§ 1701(a)(7), 1732), and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 706(2).

#### COUNT IV

32. Section 102(2)(c) of the National Environmental Policy Act (NEPA) requires all federal agencies, including defendant United States Department of the Interior, to "[i]nclude in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement [commonly referred to as an environmental impact statement or EIS] by the responsible official on . . . the environmental impact of the proposed action. . . ." This provision imposes a mandatory duty upon the defendants to prepare an environmental impact statement on each individual land classification termination and land withdrawal revocation, on the cumulative effects of these actions, and on the Withdrawal Review Program itself.

33. Upon information and belief, defendants have not prepared environmental impact statements on the Withdrawal Review Program or any of its components including the land status actions enumerated in Exhibit A.

34. Defendants' failure to prepare such environmental impact statements in compliance with the Council on Environmental Quality's NEPA regulations (40 C.F.R. §§ 1500, *et seq.*) and the Department of the Interior NEPA procedures and regulations is a violation of defendants' duties under the National Environmental Policy Act, and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 706.

#### COUNT V

35. Section 310 of the Federal Land Policy and Management Act [sic] 43 U.S.C. § 1740), the Administrative Procedure Act, and the regulations adopted thereunder, require the defendants to promulgate rules and regulations implementing the land management objectives of the Federal Land Management and Policy Act.

36. Defendants have not promulgated regulations governing the revocation of withdrawals, including the termination of land classifications.

37. Defendants' failure to promulgate rules and regulations governing termination of land classifications and land withdrawals prior to taking such actions is a violation of defendants' duties under the Federal Land Policy and Management Act and the Administrative Procedure Act and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 706.

38. Alternatively, Section 553 of the Administrative Procedure Act (5 U.S.C. § 553) requires Federal agencies to promulgate regulations only after the public has been given notice and been afforded a reasonable opportunity to comment on proposed regulations.

39. No regulations regarding terminations of land withdrawals, including land classifications, undertaken pursuant to the Federal Land Management and Policy Act have been

promulgated by defendants in accordance with the notice and comment provisions of the Administrative Procedure Act.

40. Defendants have instead issued various directives, instructional memoranda, manuals, and other documents providing information and guidance to defendants' employees and agents on the manner in which the land withdrawal review program should be conducted. The public was afforded no opportunity for comment on these documents.

41. Defendants' issuance of various documents constituting *de facto* regulations regarding land classification and land withdrawal terminations without public notice and opportunity for public comment is a violation of defendants' duties under the Administrative Procedure Act, and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 551, *et seq.*

#### COUNT VI

42. On information and belief, defendants' decisions to terminate land classifications and land withdrawals, including those enumerated in Exhibit A, are not justified by the administrative record and are therefore in violation of the Administrative Procedure Act, and are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 706(2).

#### COUNT VII

43. Defendants have provided no opportunity for public comment on, or other public participation or involvement in, their decisions regarding the Land Withdrawal Review Program.

44. For the land use status actions enumerated in Exhibit A, no notice of proposed action was published in the

*Federal Register* prior to the action being taken. No public comment was invited or considered.

45. Upon information and belief, defendants have terminated other withdrawals, including land classifications, without providing an opportunity for meaningful public participation. No notices of proposed action were published. No public comment was invited.

46. Defendants' failure to provide for public participation in the development of the Withdrawal Review Program, in the land use status actions enumerated in Exhibit A and other terminations of land classifications and other land withdrawals is a violation of defendants' duties under Sections 102(a)(5), 202(c)(9), 202(f), and 309(e) of the Federal Land Policy and Management Act (43 U.S.C. §§ 1701(a)(5), 1712(c)(9), 1712(f), 1739(e)) and of the Administrative Procedure Act, and the regulations promulgated thereunder, and is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law. 5 U.S.C. § 706.

#### COUNT VIII

47. On information and belief, defendants' decisions to terminate land classifications and other land withdrawals, including those enumerated in Exhibit A, were not done in compliance with applicable regulations. Among other things, defendants' actions were not determined to be in conformity with the approved Resource Management Plans as required by 43 CFR § 1610.5-3 (1984), and where no applicable Resource Management Plan had been approved, defendants' actions were not supported by conformance determinations or other required documentation pursuant to 43 CFR § 1610.8 (1984).

48. Defendants' termination of land withdrawals, including land classifications, absent compliance with applicable regulations violated the defendants' duties pursuant

to those regulations, the Federal Land Policy and Management Act, and the Administrative Procedure Act, and was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 706.

#### PRAYER FOR RELIEF

Plaintiff respectfully requests that this Court:

(a) Adjudge and declare that defendants' Land Withdrawal Review program has been conducted in violation of applicable law and regulations.

(b) Enjoin the defendants from taking any action inconsistent with any withdrawal, classification, or other designation governing the use of public lands that was in effect on January 1, 1981, until such time as the defendants evaluate such actions in land use plans and environmental impact statements, submit such proposed actions to the President and Congress for review, and otherwise fully comply with applicable law and regulations. Among other things, the defendants should be enjoined from issuing leases; approving licences, mining plans, or plans of operations; selling, exchanging or otherwise disposing of land or interests in land; or granting easements or rights-of-way.

(c) Order that defendants reinstate all land classifications and other land withdrawals which were in existence on January 1, 1981, until such time as the defendants evaluate such actions in land use plans and environmental impact statements, submit such proposed actions to the President and Congress for review, and otherwise fully comply with applicable law and regulations;

(d) Order that defendants rescind all directives, instructional memoranda, manuals, or other documents providing information or guidance on the termination of land classifications or land withdrawals until such time as they have promulgated rules and regulations in accordance with applicable law and regulations;

(e) Grant the plaintiff its costs, disbursements, and attorneys fees; and

(f) Issue such other relief as the Court deems just and proper.

Respectfully submitted,

/s/ [SIGNATURE ILLEGIBLE]

NORMAN L. DEAN, JR.

KATHLEEN C. ZIMMERMAN

National Wildlife Federation

1412 16th Street, N.W.

Washington, D.C. 20036

(202) 797-6817

Attorneys for Plaintiff

National Wildlife Federation

Dated: August 19, 1985

# CERTIFICATE OF SERVICE

I hereby certify that on August 19, 1985, I delivered a copy of the Amended Complaint for Declaratory and Injunctive Relief to Susan Cook and Pauline Milius, United States Department of Justice, 10th Street and Constitution Avenue, N.W., Washington, D.C.

/s/ By [SIGNATURE ILLEGIBLE]

NORMAN L. DEAN, JR.

National Wildlife Federation

1412 16th Street, N.W.

Washington, D.C. 20036

(202) 797-6817

Attorney for Plaintiff

# EXHIBIT A

National Wildlife Federation v. Burford  
Land Withdrawal Review Actions Published in  
the Federal Register Since January 1, 1981 (Revised)

No.	Federal Register Citation	State	Acres Affected
1	46 Federal Register 1734 (01/07/81)	OR	60.00
2	46 Federal Register 2048 (01/08/81)	AZ	43307.09
3	46 Federal Register 2046 (01/08/81)	CA	418.18
4	46 Federal Register 2046 (01/08/81)	NV	640.00
5	46 Federal Register 2047 (01/08/81)	OR	690.00
6	46 Federal Register 2047 (01/08/81)	OR	160.00
7	46 Federal Register 2047 (01/08/81)	OR	80.00
8	46 Federal Register 6942 (01/22/81)	AZ	42.77
9	46 Federal Register 6944 (01/22/81)	ID	40.00
10	46 Federal Register 6947 (01/22/81)	MT	80.00
11	46 Federal Register 6948 (01/22/81)	OR	40.00
12	46 Federal Register 6948 (01/22/81)	OR	80.00
13	46 Federal Register 6946 (01/22/81)	OR	440.00
14	46 Federal Register 6946 (01/22/81)	OR	40.00
15	46 Federal Register 6946 (01/22/81)	OR	40.00
16	46 Federal Register 6945 (01/22/81)	OR	6.24
17	46 Federal Register 6943 (01/22/81)	OR	80.00
18	46 Federal Register 6943 (01/22/81)	OR	289.28
19	46 Federal Register 6944 (01/22/81)	WA	680.00
20	46 Federal Register 7340 (01/23/81)	CA	1040.00
21	46 Federal Register 7341 (01/23/81)	CA	80.00
22	46 Federal Register 7345 (01/23/81)	ID	840.00
23	46 Federal Register 7346 (01/23/81)	ID	80.00
24	46 Federal Register 7343 (01/23/81)	MT	320.00
25	46 Federal Register 7343 (01/23/81)	MT	40.00
26	46 Federal Register 7345 (01/23/81)	NM	1360.00
27	46 Federal Register 7341 (01/23/81)	NV	80.00
28	46 Federal Register 7339 (01/23/81)	NM	53654.00
29	46 Federal Register 7347 (01/23/81)	MT	75.00
30	46 Federal Register 7344 (01/23/81)	OR	1635.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
31	46 Federal Register 7340 (01/23/81)	OR	140.00
32	46 Federal Register 7348 (01/23/81)	OR	9398.92
33	46 Federal Register 7346 (01/23/81)	OR	123.56
34	46 Federal Register 7346 (01/23/81)	OR	40.00
35	46 Federal Register 7345 (01/23/81)	OR	200.00
36	46 Federal Register 7343 (01/23/81)	OR	320.00
37	46 Federal Register 7338 (01/23/81)	UT	2302.91
38	46 Federal Register 7342 (01/23/81)	OR	160.00
39	46 Federal Register 7341 (01/23/81)	OR	120.00
40	46 Federal Register 7347 (01/23/81)	OR	200.00
41	46 Federal Register 7348 (01/23/81)	UT	4273.73
42	46 Federal Register 7349 (01/23/81)	UT	142.21
43	46 Federal Register 7348 (01/23/81)	UT	34265.00
44	46 Federal Register 7347 (01/23/81)	UT	160.00
45	46 Federal Register 7342 (01/23/81)	OR	46.53
46	46 Federal Register 8520 (01/27/81)	MT	120.00
47	46 Federal Register 9585 (01/29/81)	AK	15.54
48	46 Federal Register 14016 (02/25/81)	OR	120.00
49	46 Federal Register 14016 (02/25/81)	OR	3917.39
50	46 Federal Register 14189 (02/26/81)	AZ	4943.50
51	46 Federal Register 15216 (03/04/81)	UT	242.40
52	46 Federal Register 16137 (03/11/81)	CA	7144.00
53	46 Federal Register 18793 (03/26/81)	UT	
54	46 Federal Register 21836 (04/14/81)	WY	3790.66
55	46 Federal Register 23819 (04/28/81)	WY	125.28
56	46 Federal Register 26564 (05/13/81)	WA	237.80
57	46 Federal Register 27773 (05/20/81)	NM	4456048.00
58	46 Federal Register 27651 (05/21/81)	AZ	764.28
59	46 Federal Register 27651 (05/21/81)	ID	39231.37
60	46 Federal Register 27652 (05/21/81)	NV	78328.00
61	46 Federal Register 27653 (05/21/81)	OR	24.86
62	46 Federal Register 27653 (05/21/81)	WY	17.50
63	46 Federal Register 28166 (05/26/81)	AZ	1280.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
64	46 Federal Register 28163 (05/26/81)	CO	21993.30
65	46 Federal Register 28164 (05/26/81)	AZ	32245.51
66	46 Federal Register 28164 (05/26/81)	OR	40.00
67	46 Federal Register 28165 (05/26/81)	OR	200.00
68	46 Federal Register 28165 (05/26/81)	OR	12.51
69	46 Federal Register 28165 (05/26/81)	OR	30.00
70	46 Federal Register 28165 (05/26/81)	OR	11124.03
71	46 Federal Register 28167 (05/26/81)	OR	80.00
72	46 Federal Register 28167 (05/26/81)	UT	2543.45
73	46 Federal Register 28417 (05/27/81)	UT	60.00
74	46 Federal Register 28417 (05/27/81)	UT	68.66
75	46 Federal Register 28404 (05/27/81)	CA	120.00
76	46 Federal Register 28416 (05/27/81)	UT	272.00
77	46 Federal Register 28406 (05/27/81)	MT	850.77
78	46 Federal Register 28416 (05/27/81)	UT	44.99
79	46 Federal Register 28406 (05/27/81)	MT	160.00
80	46 Federal Register 28416 (05/27/81)	UT	313080.00
81	46 Federal Register 28405 (05/27/81)	MT	40.00
82	46 Federal Register 28418 (05/27/81)	WA	4.92
83	46 Federal Register 28406 (05/27/81)	NV	4280.00
84	46 Federal Register 28414 (05/27/81)	OR	77.31
85	46 Federal Register 28415 (05/27/81)	OR	275.11
86	46 Federal Register 28410 (05/27/81)	NM	400.00
87	46 Federal Register 28415 (05/27/81)	OR	80.00
88	46 Federal Register 28411 (05/27/81)	NM	240.00
89	46 Federal Register 28414 (05/27/81)	OR	60.00
90	46 Federal Register 28409 (05/27/81)	NV	2600.00
91	46 Federal Register 28413 (05/27/81)	OR	120.00
92	46 Federal Register 28409 (05/27/81)	NV	130.00
93	46 Federal Register 28413 (05/27/81)	OR	40.00
94	46 Federal Register 28412 (05/27/81)	OR	40.00
95	46 Federal Register 28415 (05/27/81)	OR	116.12
96	46 Federal Register 28411 (05/27/81)	OR	519.69

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
97	46 Federal Register 28413 (05/27/81)	OR	360.00
98	46 Federal Register 28411 (05/27/81)	OR	160.00
99	46 Federal Register 28418 (05/27/81)	WY	605.52
100	46 Federal Register 28517 (05/27/81)	NM	920000.00
101	46 Federal Register 28417 (05/27/81)	WA	125.91
102	46 Federal Register 28517 (05/27/81)	NM	605200.00
103	46 Federal Register 28404 (05/27/81)	CO	21998.87
104	46 Federal Register 28412 (05/27/81)	OR	40.00
105	46 Federal Register 28410 (05/27/81)	NM	50.00
106	46 Federal Register 28517 (05/27/81)	NM	123115.00
107	46 Federal Register 28407 (05/27/81)	NV	160.00
108	46 Federal Register 28414 (05/27/81)	OR	40.00
109	46 Federal Register 28405 (05/27/81)	MT	40.02
110	46 Federal Register 28515 (05/27/81)	ID	1079.00
111	46 Federal Register 28406 (05/27/81)	MT	240.00
112	46 Federal Register 28408 (05/27/81)	NV	73732.00
113	46 Federal Register 28410 (05/27/81)	NM	635.54
114	46 Federal Register 28414 (05/27/81)	OR	60.00
115	46 Federal Register 28412 (05/27/81)	OR	40.00
116	46 Federal Register 28652 (05/28/81)	CA	903.93
117	46 Federal Register 28754 (05/28/81)	NM	1053000.00
118	46 Federal Register 28656 (05/28/81)	OR	160.00
119	46 Federal Register 28651 (05/28/81)	CA	673.25
120	46 Federal Register 28655 (05/28/81)	OR	240.00
121	46 Federal Register 28654 (05/28/81)	CA	1027.83
122	46 Federal Register 28655 (05/28/81)	MT	160.00
123	46 Federal Register 28652 (05/28/81)	CA	240.00
124	46 Federal Register 28652 (05/28/81)	CA	15285.00
125	46 Federal Register 28655 (05/28/81)	CA	2080.00
126	46 Federal Register 28854 (05/29/81)	CA	185.00
127	46 Federal Register 28852 (05/29/81)	CA	195.88
128	46 Federal Register 28854 (05/29/81)	CA	640.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
129	46 Federal Register 28853 (05/29/81)	CA	650.50
130	46 Federal Register 28853 (05/29/81)	CA	16.47
131	46 Federal Register 28854 (05/29/81)	CA	77.22
132	46 Federal Register 28858 (05/29/81)	OR	339.89
133	46 Federal Register 28854 (05/29/81)	CA	39.94
134	46 Federal Register 28857 (05/29/81)	OR	40.00
135	46 Federal Register 28855 (05/29/81)	CA	40.00
136	46 Federal Register 28857 (05/29/81)	OR	160.00
137	46 Federal Register 28852 (05/29/81)	CA	4132.15
138	46 Federal Register 28953 (05/29/81)	NM	9177.00
139	46 Federal Register 28851 (05/29/81)	CA	163.34
140	46 Federal Register 28855 (05/29/81)	CA	2113.42
141	46 Federal Register 28857 (05/29/81)	MT	40.00
142	46 Federal Register 28953 (05/29/81)	NM	121.00
143	46 Federal Register 29263 (06/01/81)	OR	40.62
144	46 Federal Register 29510 (06/03/81)	MT	284.28
145	46 Federal Register 29710 (06/03/81)	UT	10985.22
146	46 Federal Register 29939 (06/04/81)	ID	80.00
147	46 Federal Register 29938 (06/04/81)	OR	40.00
148	46 Federal Register 29938 (06/04/81)	OR	599.50
149	46 Federal Register 29939 (06/04/81)	WA	8.17
150	46 Federal Register 29939 (06/04/81)	WY	239.04
151	46 Federal Register 29939 (06/04/81)	WA	400.00
152	46 Federal Register 31776 (06/17/81)	NM	19627.78
153	46 Federal Register 31776 (06/17/81)	NM	96069.00
154	46 Federal Register 31776 (06/17/81)	NM	1445108.00
155	46 Federal Register 31892 (06/18/81)	AZ	20.00
156	46 Federal Register 31947 (06/18/81)	NM	5516.52
157	46 Federal Register 31947 (06/18/81)	NM	31841.69
158	46 Federal Register 31892 (06/18/81)	NM	77.70
159	46 Federal Register 31893 (06/18/81)	OR	120.00
160	46 Federal Register 31892 (06/18/81)	OR	139.81

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
161	46 Federal Register 31893 (06/18/81)	OR	40.00
162	46 Federal Register 31894 (06/18/81)	OR	60.00
163	46 Federal Register 31894 (06/18/81)	OR	236.54
164	46 Federal Register 31894 (06/18/81)	OR	240.00
165	46 Federal Register 31895 (06/18/81)	OR	1500.00
166	46 Federal Register 31947 (06/18/81)	NM	
167	46 Federal Register 31947 (06/18/81)	WY	0.40
168	46 Federal Register 35504 (07/09/81)	AZ	189657.00
169	46 Federal Register 35507 (07/09/81)	SD	80.00
170	46 Federal Register 35510 (07/09/81)	MT	240.00
171	46 Federal Register 35509 (07/09/81)	OR	40.00
172	46 Federal Register 35508 (07/09/81)	MT	156.17
173	46 Federal Register 35509 (07/09/81)	OR	160.35
174	46 Federal Register 35503 (07/09/81)	ID	100.16
175	46 Federal Register 35508 (07/09/81)	WY	3559.79
176	46 Federal Register 35504 (07/09/81)	NV	374193.00
177	46 Federal Register 35504 (07/09/81)	ID	6165.37
178	46 Federal Register 35509 (07/09/81)	MT	1577.38
179	46 Federal Register 35510 (07/09/81)	MT	240.00
180	46 Federal Register 35507 (07/09/81)	NM	213.86
181	46 Federal Register 35507 (07/09/81)	WY	11.21
182	46 Federal Register 35504 (07/09/81)	NV	
183	46 Federal Register 39480 (08/03/81)	CA	5.00
184	46 Federal Register 39683 (08/04/81)	ID	50967.00
185	46 Federal Register 42199 (08/19/81)	UT	310600.00
186	46 Federal Register 42921 (08/25/81)	MT	114.00
187	46 Federal Register 43508 (08/28/81)	NV	1220.98
188	46 Federal Register 43508 (08/28/81)	NV	1731.71
189	46 Federal Register 43886 (09/01/81)	CA	298.00
190	46 Federal Register 44983 (09/09/81)	MT	3.79
191	46 Federal Register 44983 (09/09/81)	MT	120.00
192	46 Federal Register 44984 (09/09/81)	MT	80.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
193	46 Federal Register 45137 (09/10/81)	AZ	1000.00
194	46 Federal Register 45132 (09/10/81)	AZ	217624.26
195	46 Federal Register 45131 (09/10/81)	MT	60.00
196	46 Federal Register 45131 (09/10/81)	MT	155.38
197	46 Federal Register 45611 (09/14/81)	MT	45.62
198	46 Federal Register 45819 (09/15/81)	OR	19657.53
199	46 Federal Register 46134 (09/17/81)	WY	2367.16
200	46 Federal Register 46409 (09/18/81)	WY	132000.00
201	46 Federal Register 48670 (10/02/81)	CA	664.48
202	46 Federal Register 48671 (10/02/81)	CA	40.00
203	46 Federal Register 48670 (10/02/81)	AZ	320.90
204	46 Federal Register 48670 (10/02/81)	CA	40.00
205	46 Federal Register 48667 (10/02/81)	MT	3848.69
206	46 Federal Register 48667 (10/02/81)	NM	55.25
207	46 Federal Register 48668 (10/02/81)	NM	1680.00
208	46 Federal Register 48676 (10/02/81)	ID	2393.49
209	46 Federal Register 48676 (10/02/81)	OR	131.95
210	46 Federal Register 48672 (10/02/81)	ID	1360.00
211	46 Federal Register 48674 (10/02/81)	OR	680.00
212	46 Federal Register 48667 (10/02/81)	NM	157.48
213	46 Federal Register 48675 (10/02/81)	OR	662.89
214	46 Federal Register 48668 (10/02/81)	NM	95.20
215	46 Federal Register 48666 (10/02/81)	ID	200.00
216	46 Federal Register 48672 (10/02/81)	ID	239.94
217	46 Federal Register 48673 (10/02/81)	NM	40.00
218	46 Federal Register 48673 (10/02/81)	MT	112.00
219	46 Federal Register 48669 (10/02/81)	OR	400.00
220	46 Federal Register 48674 (10/02/81)	OR	200.17
221	46 Federal Register 48669 (10/02/81)	WY	30.00
222	46 Federal Register 48675 (10/02/81)	WA	1.00
223	46 Federal Register 48669 (10/02/81)	UT	1277.62
224	46 Federal Register 48995 (10/05/81)	WY	160.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
225	46 Federal Register 49649 (10/07/81)	AZ	10521657.00
226	46 Federal Register 49868 (10/08/81)	AZ	3484.00
227	46 Federal Register 49868 (10/08/81)	AZ	4000.00
228	46 Federal Register 49868 (10/08/81)	AZ	50.00
229	46 Federal Register 49871 (10/08/81)	CA	240.00
230	46 Federal Register 49869 (10/08/81)	CA	7949.00
231	46 Federal Register 49871 (10/08/81)	CA	56.00
232	46 Federal Register 49872 (10/08/81)	MT	80.00
233	46 Federal Register 49874 (10/08/81)	OR	150.00
234	46 Federal Register 49873 (10/08/81)	OR	179.31
235	46 Federal Register 49873 (10/08/81)	OR	1080.00
236	46 Federal Register 49872 (10/08/81)	OR	759.90
237	46 Federal Register 49874 (10/08/81)	OR	1459.56
238	46 Federal Register 49873 (10/08/81)	OR	390.86
239	46 Federal Register 49875 (10/08/81)	OR	187.46
240	46 Federal Register 49872 (10/08/81)	OR	360.00
241	46 Federal Register 49875 (10/08/81)	UT	226.98
242	46 Federal Register 49876 (10/08/81)	WA	5.50
243	46 Federal Register 49875 (10/08/81)	WA	40.00
244	46 Federal Register 49876 (10/08/81)	WY	80.13
245	46 Federal Register 49877 (10/08/81)	WY	7451.38
246	46 Federal Register 49876 (10/08/81)	WY	77.51
247	46 Federal Register 50541 (10/14/81)	WY	600.00
248	46 Federal Register 50857 (10/15/81)	NV	5.00
249	46 Federal Register 51050 (10/16/81)	WY	750000.00
250	46 Federal Register 51050 (10/16/81)	WY	467902.68
251	46 Federal Register 51246 (10/19/81)	FL	1.25
252	46 Federal Register 52039 (10/23/81)	WY	12.56
253	46 Federal Register 53164 (10/28/81)	CA	40.00
254	46 Federal Register 53164 (10/28/81)	CA	3370.00
255	46 Federal Register 53162 (10/28/81)	CA	34.00
256	46 Federal Register 53164 (10/28/81)	CA	0.24

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
257	46 Federal Register 53165 (10/28/81)	CO	40.00
258	46 Federal Register 53166 (10/28/81)	CO	320.00
259	46 Federal Register 53166 (10/28/81)	NM	9.66
260	46 Federal Register 53166 (10/28/81)	OR	160.84
261	46 Federal Register 53169 (10/28/81)	OR	40.00
262	46 Federal Register 53167 (10/28/81)	OR	24028.67
263	46 Federal Register 53168 (10/28/81)	OR	493.14
264	46 Federal Register 53168 (10/28/81)	OR	49.76
265	46 Federal Register 53169 (10/28/81)	UT	132.85
266	46 Federal Register 53163 (10/28/81)	UT	27.32
267	46 Federal Register 53167 (10/28/81)	OR	290.09
268	46 Federal Register 53168 (10/28/81)	OR	80.00
269	46 Federal Register 53169 (10/28/81)	OR	40.00
270	46 Federal Register 53162 (10/28/81)	OR	321.45
271	46 Federal Register 53167 (10/28/81)	OR	400.00
272	46 Federal Register 53169 (10/28/81)	UT	15.00
273	46 Federal Register 53170 (10/28/81)	WY	133.00
274	46 Federal Register 53171 (10/28/81)	WY	240.00
275	46 Federal Register 53169 (10/28/81)	UT	15.00
276	46 Federal Register 53170 (10/28/81)	WA	155.00
277	46 Federal Register 53163 (10/28/81)	CA	40.00
278	46 Federal Register 53165 (10/28/81)	CA	
279	46 Federal Register 53417 (10/29/81)	CA	16.47
280	46 Federal Register 53526 (10/29/81)	NV	27737.45
281	46 Federal Register 54345 (11/02/81)	OR	688.87
282	46 Federal Register 54344 (11/02/81)	OR	951.10
283	46 Federal Register 54345 (11/02/81)	OR	30.00
284	46 Federal Register 54344 (11/02/81)	OR	309.00
285	46 Federal Register 54345 (11/02/81)	WA	264.06
286	46 Federal Register 55012 (11/05/81)	CO	6589352.00
287	46 Federal Register 55265 (11/09/81)	ID	80.00
288	46 Federal Register 55265 (11/09/81)	NV	84142.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
289	46 Federal Register 56507 (11/17/81)	CA	3075.00
290	46 Federal Register 56508 (11/17/81)	UT	2330737.00
291	46 Federal Register 56666 (11/18/81)	WA	40.00
292	46 Federal Register 56667 (11/18/81)	WA	1011.00
293	46 Federal Register 56937 (11/19/81)	ID	40.00
294	46 Federal Register 56787 (11/19/81)	FL	39.93
295	46 Federal Register 56786 (11/19/81)	UT	928022.00
296	46 Federal Register 57289 (11/23/81)	CO	5096.28
297	46 Federal Register 57288 (11/23/81)	CO	3188.00
298	46 Federal Register 57289 (11/23/81)	CO	85.31
299	46 Federal Register 57290 (11/23/81)	OR	60.00
300	46 Federal Register 57290 (11/23/81)	OR	79.13
301	46 Federal Register 57290 (11/23/81)	OR	160.00
302	46 Federal Register 57763 (11/25/81)	ID	280.00
303	46 Federal Register 58192 (11/30/81)	NV	30347.60
304	46 Federal Register 58188 (11/30/81)	UT	4256.47
305	46 Federal Register 58188 (11/30/81)	UT	1299724.00
306	46 Federal Register 58188 (11/30/81)	NV	4256.00
307	46 Federal Register 58491 (12/02/81)	UT	80.00
308	46 Federal Register 58745 (12/03/81)	UT	312609.00
309	46 Federal Register 59542 (12/07/81)	OR	507.68
310	46 Federal Register 59974 (12/08/81)	UT	789.27
311	46 Federal Register 60276 (12/09/81)	OR	1151.36
312	46 Federal Register 61335 (12/16/81)	NV	1719.81
313	46 Federal Register 61335 (12/16/81)	OR	1040.00
314	46 Federal Register 62553 (12/24/81)	ID	439.12
315	46 Federal Register 62450 (12/24/81)	NM	160.00
316	46 Federal Register 62451 (12/24/81)	WA	80.00
317	46 Federal Register 63397 (12/31/81)	OR	12175.62
318	47 Federal Register 21 (01/04/82)	OR	7479.62
319	47 Federal Register 769 (01/07/82)	MT	160.00
320	47 Federal Register 857 (01/07/82)	UT	3035352.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
321	47 Federal Register 4352 (01/29/82)	OR	2370.76
322	47 Federal Register 5003 (02/03/82)	MT	1537000.00
323	47 Federal Register 5003 (02/03/82)	MT	184.00
324	47 Federal Register 5416 (02/05/82)	CO	5744.79
325	47 Federal Register 5420 (02/05/82)	CA	337.00
326	47 Federal Register 5419 (02/05/82)	CA	40.00
327	47 Federal Register 5417 (02/05/82)	CA	106871.00
328	47 Federal Register 5425 (02/05/82)	CA	2.00
329	47 Federal Register 5416 (02/05/82)	CO	240.00
330	47 Federal Register 5421 (02/05/82)	CO	441.47
331	47 Federal Register 5423 (02/05/82)	ID	83.98
332	47 Federal Register 5424 (02/05/82)	MT	40.00
333	47 Federal Register 5419 (02/05/82)	MT	80.00
334	47 Federal Register 5470 (02/05/82)	MT	175922.00
335	47 Federal Register 5422 (02/05/82)	NV	72.00
336	47 Federal Register 5418 (02/05/82)	NV	39310.00
337	47 Federal Register 5424 (02/05/82)	WY	75.90
338	47 Federal Register 5422 (02/05/82)	ND	640.00
339	47 Federal Register 5421 (02/05/82)	WY	156.32
340	47 Federal Register 5471 (02/05/82)	NV	420.00
341	47 Federal Register 5423 (02/05/82)	WA	10.95
342	47 Federal Register 5422 (02/05/82)	OR	0.77
343	47 Federal Register 5419 (02/05/82)	OR	42917.83
344	47 Federal Register 5418 (02/05/82)	WY	5.00
345	47 Federal Register 5471 (02/05/82)	NV	2.50
346	47 Federal Register 5424 (02/05/82)	OR	82.91
347	47 Federal Register 5421 (02/05/82)	OR	40.00
348	47 Federal Register 6099 (02/10/82)	ID	265000.00
349	47 Federal Register 6360 (02/11/82)	MT	1320.00
350	47 Federal Register 6429 (02/12/82)	AZ	12537.23
351	47 Federal Register 6646 (02/16/82)	WA	22.39
352	47 Federal Register 6852 (02/17/82)	CA	40.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
353	47 Federal Register 6856 (02/17/82)	CA	36.20
354	47 Federal Register 6851 (02/17/82)	CO	40.00
355	47 Federal Register 7002 (02/17/82)	NV	1405.91
356	47 Federal Register 6851 (02/17/82)	NV	80.00
357	47 Federal Register 6852 (02/17/82)	MT	156.26
358	47 Federal Register 6857 (02/17/82)	NV	240.00
359	47 Federal Register 7000 (02/17/82)	ID	74400.00
360	47 Federal Register 6851 (02/17/82)	NV	10.00
361	47 Federal Register 6854 (02/17/82)	CO	7126.80
362	47 Federal Register 6850 (02/17/82)	UT	242.96
363	47 Federal Register 6856 (02/17/82)	ID	90.00
364	47 Federal Register 6855 (02/17/82)	CO	2089.90
365	47 Federal Register 6855 (02/17/82)	MT	80.00
366	47 Federal Register 6858 (02/17/82)	ID	2042.14
367	47 Federal Register 6852 (02/17/82)	CA	176.33
368	47 Federal Register 6856 (02/17/82)	OR	3681.43
369	47 Federal Register 6850 (02/17/82)	UT	40.00
370	47 Federal Register 6857 (02/17/82)	UT	39916.00
371	47 Federal Register 6849 (02/17/82)	UT	1063.00
372	47 Federal Register 6853 (02/17/82)	WY	4603.00
373	47 Federal Register 7230 (02/18/82)	WA	41.60
374	47 Federal Register 7230 (02/18/82)	CA	54.25
375	47 Federal Register 7235 (02/18/82)	WA	157.50
376	47 Federal Register 7231 (02/18/82)	CA	555.00
377	47 Federal Register 7232 (02/18/82)	WA	49.30
378	47 Federal Register 7235 (02/18/82)	CA	5822.00
379	47 Federal Register 7237 (02/18/82)	OR	520.67
380	47 Federal Register 7234 (02/18/82)	OR	1882.57
381	47 Federal Register 7238 (02/18/82)	CO	820.00
382	47 Federal Register 7236 (02/18/82)	NV	538.15
383	47 Federal Register 7237 (02/18/82)	MT	160.00
384	47 Federal Register 7234 (02/18/82)	OR	520.53

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
385	47 Federal Register 7238 (02/18/82)	CO	150.00
386	47 Federal Register 7233 (02/18/82)	MT	120.00
387	47 Federal Register 7239 (02/18/82)	MT	320.00
388	47 Federal Register 7232 (02/18/82)	OR	32.81
389	47 Federal Register 7233 (02/18/82)	WY	2680.38
390	47 Federal Register 7232 (02/18/82)	AZ	10800.00
391	47 Federal Register 7231 (02/18/82)	CA	433.05
392	47 Federal Register 7236 (02/18/82)	CO	3006.00
393	47 Federal Register 7414 (02/19/82)	CO	29972.00
394	47 Federal Register 7763 (02/22/82)	WY	5.00
395	47 Federal Register 8865 (03/02/82)	WY	1300356.00
396	47 Federal Register 9293 (03/04/82)	OR	15000.00
397	47 Federal Register 9293 (03/04/82)	OR	9841.50
398	47 Federal Register 9293 (03/04/82)	OR	62500.00
399	47 Federal Register 9839 (03/08/82)	ID	140.00
400	47 Federal Register 9838 (03/08/82)	MT	552.24
401	47 Federal Register 9841 (03/08/82)	MT	440.14
402	47 Federal Register 9838 (03/08/82)	CO	0.57
403	47 Federal Register 9840 (03/08/82)	OR	224.48
404	47 Federal Register 9840 (03/08/82)	OR	80.00
405	47 Federal Register 9840 (03/08/82)	UT	8823.00
406	47 Federal Register 9838 (03/08/82)	WA	71.00
407	47 Federal Register 9839 (03/08/82)	WY	320.80
408	47 Federal Register 9841 (03/08/82)	WA	3.00
409	47 Federal Register 10213 (03/10/82)	WY	80.00
410	47 Federal Register 10214 (03/10/82)	MT	145.00
411	47 Federal Register 10213 (03/10/82)	NM	114.96
412	47 Federal Register 10214 (03/10/82)	OR	30.20
413	47 Federal Register 10214 (03/10/82)	OR	79.95
414	47 Federal Register 10215 (03/10/82)	OR	158.44
415	47 Federal Register 10296 (03/10/82)	OR	31825.11
416	47 Federal Register 10213 (03/10/82)	WA	160.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
417	47 Federal Register 10215 (03/10/82)	CO	40.00
418	47 Federal Register 10825 (03/12/82)	AZ	640.00
419	47 Federal Register 10826 (03/12/82)	CO	520.00
420	47 Federal Register 10826 (03/12/82)	UT	1023.50
421	47 Federal Register 10825 (03/12/82)	WY	161.00
422	47 Federal Register 11282 (03/16/82)	OR	40.00
423	47 Federal Register 11662 (03/18/82)	CA	74.52
424	47 Federal Register 11667 (03/18/82)	CA	0.13
425	47 Federal Register 11668 (03/18/82)	FL	
426	47 Federal Register 11665 (03/18/82)	MT	287.35
427	47 Federal Register 11676 (03/18/82)	ND	160.00
428	47 Federal Register 11665 (03/18/82)	OR	479.90
429	47 Federal Register 11670 (03/18/82)	CO	31514.00
430	47 Federal Register 11675 (03/18/82)	UT	40.00
431	47 Federal Register 11666 (03/18/82)	OR	2717.25
432	47 Federal Register 11663 (03/18/82)	UT	8761.08
433	47 Federal Register 11669 (03/18/82)	OR	1280.00
434	47 Federal Register 11670 (03/18/82)	UT	142.21
435	47 Federal Register 11673 (03/18/82)	NV	16.00
436	47 Federal Register 11667 (03/18/82)	MT	40.00
437	47 Federal Register 11669 (03/18/82)	OR	1129.86
438	47 Federal Register 11675 (03/18/82)	OR	1.56
439	47 Federal Register 11664 (03/18/82)	MT	1834.77
440	47 Federal Register 11671 (03/18/82)	WY	15676.55
441	47 Federal Register 11667 (03/18/82)	WY	7.05
442	47 Federal Register 11674 (03/18/82)	WA	180.10
443	47 Federal Register 11664 (03/18/82)	WA	2682.02
444	47 Federal Register 11666 (03/18/82)	WA	40.00
445	47 Federal Register 11871 (03/19/82)	OR	1360.00
446	47 Federal Register 12172 (03/22/82)	MT	13817.00
447	47 Federal Register 13052 (03/26/82)	WY	6440.52
448	47 Federal Register 13418 (03/30/82)	OR	98000.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
449	47 Federal Register 14157 (04/02/82)	MT	120.00
450	47 Federal Register 14158 (04/02/82)	MT	40.00
451	47 Federal Register 16107 (04/14/82)	ID	2918.86
452	47 Federal Register 16220 (04/15/82)	UT	985692.00
453	47 Federal Register 16221 (04/15/82)	UT	809400.00
454	47 Federal Register 16222 (04/15/82)	UT	56109.00
455	47 Federal Register 16220 (04/15/82)	UT	1097888.00
456	47 Federal Register 16221 (04/15/82)	UT	579069.00
457	47 Federal Register 16220 (04/15/82)	UT	1837400.00
458	47 Federal Register 16221 (04/15/82)	UT	2929000.00
459	47 Federal Register 16627 (04/19/82)	CO	1513.00
460	47 Federal Register 16628 (04/19/82)	OR	866.88
461	47 Federal Register 16682 (04/19/82)	NV	320.00
462	47 Federal Register 16626 (04/19/82)	WY	2278.38
463	47 Federal Register 17060 (04/21/82)	OR	3845.00
464	47 Federal Register 17117 (04/21/82)	UT	1365340.00
465	47 Federal Register 17818 (04/26/82)	MT	320.00
466	47 Federal Register 18054 (04/27/82)	UT	527000.00
467	47 Federal Register 18435 (04/29/82)	UT	1948.00
468	47 Federal Register 18679 (04/30/82)	MT	3.56
469	47 Federal Register 19344 (05/05/82)	ID	135.00
470	47 Federal Register 20590 (05/13/82)	OR	40.00
471	47 Federal Register 21547 (05/19/82)	FL	39.91
472	47 Federal Register 21547 (05/19/82)	ID	7857.08
473	47 Federal Register 21546 (05/19/82)	OR	200.00
474	47 Federal Register 21797 (05/20/82)	MT	127.25
475	47 Federal Register 21796 (05/20/82)	ID	200.15
476	47 Federal Register 23935 (06/02/82)	NV	48.00
477	47 Federal Register 24133 (06/03/82)	CA	0.48
478	47 Federal Register 24455 (06/04/82)	OR	23997.13
479	47 Federal Register 24452 (06/04/82)	NV	649.00
480	47 Federal Register 24452 (06/04/82)	OR	4857.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
481	47 Federal Register 25213 (06/10/82)	OR	17827.00
482	47 Federal Register 26029 (06/16/82)	MT	4875742.60
483	47 Federal Register 26129 (06/17/82)	WA	1.15
484	47 Federal Register 26131 (06/17/82)	CA	38.75
485	47 Federal Register 26130 (06/17/82)	WA	33.00
486	47 Federal Register 26130 (06/17/82)	MT	1280.00
487	47 Federal Register 26132 (06/17/82)	OR	920.00
488	47 Federal Register 26130 (06/17/82)	NV	1280.00
489	47 Federal Register 26132 (06/17/82)	UT	1314.00
490	47 Federal Register 26131 (06/17/82)	WA	623.93
491	47 Federal Register 26133 (06/17/82)	CA	40.00
492	47 Federal Register 26129 (06/17/82)	OR	92.78
493	47 Federal Register 27079 (06/23/82)	ID	92.00
494	47 Federal Register 27078 (06/23/82)	MT	783.13
495	47 Federal Register 27079 (06/23/82)	ID	160.00
496	47 Federal Register 27287 (06/24/82)	CO	40.00
497	47 Federal Register 27286 (06/24/82)	CA	937.89
498	47 Federal Register 27285 (06/24/82)	MT	0.39
499	47 Federal Register 27284 (06/24/82)	MT	120.00
500	47 Federal Register 27283 (06/24/82)	MT	70.38
501	47 Federal Register 27290 (06/24/82)	NM	320.00
502	47 Federal Register 27290 (06/24/82)	OR	7855.29
503	47 Federal Register 27285 (06/24/82)	OR	1866.89
504	47 Federal Register 27289 (06/24/82)	OR	1602.18
505	47 Federal Register 27286 (06/24/82)	UT	120.00
506	47 Federal Register 27290 (06/24/82)	WA	5160.00
507	47 Federal Register 27285 (06/24/82)	WA	484.31
508	47 Federal Register 27285 (06/24/82)	WA	128.65
509	47 Federal Register 27287 (06/24/82)	UT	4440.00
510	47 Federal Register 27287 (06/24/82)	CO	40.00
511	47 Federal Register 27623 (06/25/82)	WY	40.00
512	47 Federal Register 28382 (06/30/82)	CA	6526.80

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
513	47 Federal Register 28382 (06/30/82)	UT	136371.21
514	47 Federal Register 28656 (07/01/82)	SD	1600.00
515	47 Federal Register 28657 (07/01/82)	SD	55.00
516	47 Federal Register 28840 (07/01/82)	UT	1645062.00
517	47 Federal Register 29553 (07/09/82)	CA	31245.00
518	47 Federal Register 29846 (07/09/82)	UT	120.00
519	47 Federal Register 30878 (07/15/82)	OR	341700.00
520	47 Federal Register 31691 (07/22/82)	CA	40.00
521	47 Federal Register 31692 (07/22/82)	MT	2.50
522	47 Federal Register 31692 (07/22/82)	ID	37.50
523	47 Federal Register 31693 (07/22/82)	MT	317.37
524	47 Federal Register 32426 (07/27/82)	ID	80.00
525	47 Federal Register 32424 (07/27/82)	MT	1685.97
526	47 Federal Register 32425 (07/27/82)	OR	4710.62
527	47 Federal Register 32424 (07/27/82)	UT	3975.98
528	47 Federal Register 32488 (07/27/82)	OR	1800000.00
529	47 Federal Register 32711 (07/29/82)	NV	82248.00
530	47 Federal Register 32712 (07/29/82)	WA	714000.00
531	47 Federal Register 32801 (07/29/82)	WY	3820255.00
532	47 Federal Register 32800 (07/29/82)	WY	3641500.00
533	47 Federal Register 33325 (08/02/82)	ID	439200.96
534	47 Federal Register 33327 (08/02/82)	NV	5.00
535	47 Federal Register 34051 (08/05/82)	OR	4135000.00
536	47 Federal Register 34051 (08/05/82)	WA	4698.00
537	47 Federal Register 35352 (08/13/82)	OR	35950.00
538	47 Federal Register 35768 (08/17/82)	NM	35.45
539	47 Federal Register 35768 (08/17/82)	UT	3988505.00
540	47 Federal Register 36023 (08/18/82)	OR	17724.00
541	47 Federal Register 36023 (08/18/82)	OR	130960.00
542	47 Federal Register 36707 (08/23/82)	ID	635692.00
543	47 Federal Register 36713 (08/23/82)	OR	19875.00
544	47 Federal Register 36714 (08/23/82)	OR	25475.98

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
545	47 Federal Register 36713 (08/23/82)	OR	3438.13
546	47 Federal Register 36712 (08/23/82)	OR	2401435.30
547	47 Federal Register 36713 (08/23/82)	OR	320.00
548	47 Federal Register 36714 (08/23/82)	OR	15809.00
549	47 Federal Register 36980 (08/24/82)	WA	5099.00
550	47 Federal Register 37703 (08/26/82)	ID	2773.86
551	47 Federal Register 37703 (08/26/82)	ID	228290.38
552	47 Federal Register 37707 (08/26/82)	OR	186290.00
553	47 Federal Register 37707 (08/26/82)	OR	31380.00
554	47 Federal Register 38428 (08/31/82)	NV	30.00
555	47 Federal Register 38995 (09/03/82)	NV	1918636.00
556	47 Federal Register 39490 (09/08/82)	CA	320.00
557	47 Federal Register 39493 (09/08/82)	MT	1036.56
558	47 Federal Register 39492 (09/08/82)	CA	10.40
559	47 Federal Register 39494 (09/08/82)	MT	2778.11
560	47 Federal Register 39494 (09/08/82)	CA	960.00
561	47 Federal Register 39492 (09/08/82)	UT	1036.30
562	47 Federal Register 39493 (09/08/82)	ID	640.00
563	47 Federal Register 39495 (09/08/82)	MT	132.03
564	47 Federal Register 39491 (09/08/82)	ID	40.00
565	47 Federal Register 39492 (09/08/82)	CA	47094.00
566	47 Federal Register 39495 (09/08/82)	ID	200.00
567	47 Federal Register 39491 (09/08/82)	ID	2.88
568	47 Federal Register 39495 (09/08/82)	AK	2969659.00
569	47 Federal Register 39682 (09/09/82)	AZ	152793.89
570	47 Federal Register 39683 (09/09/82)	MT	80.00
571	47 Federal Register 39683 (09/09/82)	WA	5262.30
572	47 Federal Register 39827 (09/10/82)	CA	39.47
573	47 Federal Register 39824 (09/10/82)	CA	61.63
574	47 Federal Register 39825 (09/10/82)	MT	400.00
575	47 Federal Register 39825 (09/10/82)	WY	3851.66
576	47 Federal Register 39827 (09/10/82)	WY	2.50

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
577	47 Federal Register 40910 (09/16/82)	NV	40.00
578	47 Federal Register 42033 (09/23/82)	MT	25301.00
579	47 Federal Register 42032 (09/23/82)	MT	32.50
580	47 Federal Register 42362 (09/27/82)	AZ	346.34
581	47 Federal Register 42741 (09/29/82)	AK	31.73
582	47 Federal Register 42741 (09/29/82)	NV	194.00
583	47 Federal Register 43202 (09/30/82)	OR	67159.57
584	47 Federal Register 43953 (10/05/82)	AK	9600.00
585	47 Federal Register 45965 (10/14/82)	CA	5261.00
586	47 Federal Register 45966 (10/14/82)	ID	160.00
587	47 Federal Register 51799 (11/17/82)	CO	200.00
588	47 Federal Register 51799 (11/17/82)	ID	428300.00
589	47 Federal Register 51947 (11/18/82)	ID	1435.51
590	47 Federal Register 52571 (11/22/82)	NV	155800.00
591	47 Federal Register 52572 (11/22/82)	NV	1979960.00
592	47 Federal Register 52572 (11/22/82)	NV	28487520.00
593	47 Federal Register 53950 (11/30/82)	NV	2648040.00
594	47 Federal Register 54171 (12/01/82)	NV	3418900.00
595	47 Federal Register 54364 (12/02/82)	NV	5635160.00
596	47 Federal Register 54365 (12/02/82)	NV	1865500.00
597	47 Federal Register 54364 (12/02/82)	NV	6234280.00
598	47 Federal Register 56403 (12/16/82)	MT	15151.00
599	47 Federal Register 56408 (12/16/82)	UT	604370.00
600	47 Federal Register 56407 (12/16/82)	UT	
601	47 Federal Register 56562 (12/17/82)	NV	3112986.00
602	47 Federal Register 56562 (12/17/82)	NV	396935.00
603	47 Federal Register 56562 (12/17/82)	NV	1340.00
604	47 Federal Register 57275 (12/23/82)	AK	24.00
605	47 Federal Register 48382 (12/30/82)	CA	32660.00
606	48 Federal Register 1828 (01/14/83)	CA	1676.35
607	48 Federal Register 4559 (02/01/83)	MT	157.18
608	48 Federal Register 6037 (02/09/83)	UT	40.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
609	48 Federal Register 6037 (02/09/83)	WY	5792.33
610	48 Federal Register 6789 (02/15/83)	NV	80.00
611	48 Federal Register 9009 (03/03/83)	CA	40.00
612	48 Federal Register 9009 (03/03/83)	AZ	3828.31
613	48 Federal Register 9007 (03/03/83)	AZ	17559.28
614	48 Federal Register 9008 (03/03/83)	ID	1547.37
615	48 Federal Register 9008 (03/03/83)	OR	1025.17
616	48 Federal Register 9008 (03/03/83)	NM	160.00
617	48 Federal Register 9262 (03/04/83)	SD	20613.20
618	48 Federal Register 9643 (03/08/83)	MT	158.24
619	48 Federal Register 9864 (03/09/83)	MT	2722.28
620	48 Federal Register 12371 (03/24/83)	AZ	72.19
621	48 Federal Register 14597 (04/05/83)	WY	560.00
622	48 Federal Register 15193 (04/07/83)	ID	1720.37
623	48 Federal Register 15191 (04/07/83)	MT	96269.00
624	48 Federal Register 16685 (04/19/83)	MT	968.78
625	48 Federal Register 16684 (04/19/83)	ID	29.94
626	48 Federal Register 16685 (04/19/83)	OR	620.00
627	48 Federal Register 17081 (04/21/83)	CA	34.75
628	48 Federal Register 17145 (04/21/83)	SD	617.12
629	48 Federal Register 19082 (04/27/83)	CO	2177.25
630	48 Federal Register 19239 (04/28/83)	WY	400.00
631	48 Federal Register 19249 (04/28/83)	WY	2.50
632	48 Federal Register 19938 (05/03/83)	ND	7914.09
633	48 Federal Register 20294 (05/05/83)	MT	40.00
634	48 Federal Register 22149 (05/17/83)	CA	790.20
635	48 Federal Register 22152 (05/17/83)	CO	27.97
636	48 Federal Register 22151 (05/17/83)	ID	120.00
637	48 Federal Register 22153 (05/17/83)	NV	5120.00
638	48 Federal Register 22151 (05/17/83)	OR	160.45
639	48 Federal Register 22150 (05/17/83)	UT	3360.00
640	48 Federal Register 22152 (05/17/83)	UT	550.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
641	48 Federal Register 22149 (05/17/83)	WY	13470.59
642	48 Federal Register 22151 (05/17/83)	WY	226.75
643	48 Federal Register 22323 (05/24/83)	CO	1066680.00
644	48 Federal Register 23225 (05/24/83)	UT	785850.04
645	48 Federal Register 22324 (05/24/83)	WY	21519.00
646	48 Federal Register 23223 (05/24/83)	NV	0.60
647	48 Federal Register 23639 (05/26/83)	MIN	20471.67
648	48 Federal Register 26315 (06/07/83)	NM	63849.03
649	48 Federal Register 29693 (06/28/83)	CA	40.00
650	48 Federal Register 29693 (06/28/83)	CA	6117.88
651	48 Federal Register 29695 (06/28/83)	CA	920.00
652	48 Federal Register 29697 (06/28/83)	UT	825.00
653	48 Federal Register 29696 (06/28/83)	WA	0.20
654	48 Federal Register 29697 (06/28/83)	WY	75.00
655	48 Federal Register 29694 (06/28/83)	WY	25402.38
656	48 Federal Register 29694 (06/28/83)	CA	284.00
657	48 Federal Register 29696 (06/28/83)	CA	60.00
658	48 Federal Register 30119 (06/30/83)	CA	3247.74
659	48 Federal Register 25010 (07/03/83)	NV	16725.49
660	48 Federal Register 32826 (07/19/83)	AK	217.00
661	48 Federal Register 32827 (07/19/83)	AK	0.40
662	48 Federal Register 32828 (07/19/83)	CA	19.05
663	48 Federal Register 32824 (07/19/83)	CA	13130.40
664	48 Federal Register 32826 (07/19/83)	CA	40.00
665	48 Federal Register 32829 (07/19/83)	ID	367.40
666	48 Federal Register 32828 (07/19/83)	MT	40.00
667	48 Federal Register 32827 (07/19/83)	CO	40.00
668	48 Federal Register 32876 (07/19/83)	NV	170003.02
669	48 Federal Register 32875 (07/19/83)	NV	1609629.00
670	48 Federal Register 32830 (07/19/83)	OR	40.00
671	48 Federal Register 32829 (07/19/83)	OR	280.00
672	48 Federal Register 32829 (07/19/83)	OR	237.50

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
673	48 Federal Register 32827 (07/19/83)	UT	20.00
674	48 Federal Register 32830 (07/19/83)	OR	40.00
675	48 Federal Register 33301 (07/21/83)	CA	129027.00
676	48 Federal Register 33301 (07/21/83)	AK	3539.00
677	48 Federal Register 33295 (07/21/83)	CO	40.00
678	48 Federal Register 33297 (07/21/83)	ID	320.00
679	48 Federal Register 33296 (07/21/83)	ID	160.00
680	48 Federal Register 33296 (07/21/83)	ID	191.50
681	48 Federal Register 33297 (07/21/83)	ID	274.75
682	48 Federal Register 33298 (07/21/83)	OR	2257.00
683	48 Federal Register 33298 (07/21/83)	OR	492.06
684	48 Federal Register 33297 (07/21/83)	OR	975.00
685	48 Federal Register 33299 (07/21/83)	OR	90.36
686	48 Federal Register 33299 (07/21/83)	UT	39288.47
687	48 Federal Register 33366 (07/21/83)	WY	179.00
688	48 Federal Register 33712 (07/25/83)	AK	257.00
689	48 Federal Register 33716 (07/25/83)	AZ	23026.52
690	48 Federal Register 33717 (07/25/83)	ID	37.92
691	48 Federal Register 33716 (07/25/83)	CA	104.13
692	48 Federal Register 33712 (07/25/83)	OR	1791.93
693	48 Federal Register 33713 (07/25/83)	AK	46080.00
694	48 Federal Register 33717 (07/25/83)	CA	240.00
695	48 Federal Register 33710 (07/25/83)	CA	1117.61
696	48 Federal Register 33717 (07/25/83)	CO	240.00
697	48 Federal Register 33711 (07/25/83)	ID	260.00
698	48 Federal Register 33715 (07/25/83)	AK	484.02
699	48 Federal Register 33714 (07/25/83)	AK	1596.00
700	48 Federal Register 33711 (07/25/83)	ID	160.00
701	48 Federal Register 34268 (07/28/83)	WA	6557.22
702	48 Federal Register 34524 (07/29/83)	NV	196420.00
703	48 Federal Register 34743 (08/01/83)	ID	143235.90
704	48 Federal Register 36212 (08/09/83)	NV	585033.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
705	48 Federal Register 36213 (08/09/83)	NV	213.00
706	48 Federal Register 38240 (08/23/83)	CO	120.00
707	48 Federal Register 38239 (08/23/83)	AK	1630.00
708	48 Federal Register 38468 (08/24/83)	WY	136359.00
709	48 Federal Register 39999 (09/02/83)	CO	33.79
710	48 Federal Register 40724 (09/09/83)	NM	223580.71
711	48 Federal Register 43176 (09/22/83)	AZ	2388.00
712	48 Federal Register 43175 (09/22/83)	OR	32.99
713	48 Federal Register 43176 (09/22/83)	OR	47269.14
714	48 Federal Register 43175 (09/22/83)	OR	362.11
715	48 Federal Register 43175 (09/22/83)	OR	40.00
716	48 Federal Register 43176 (09/22/83)	WA	1898.74
717	48 Federal Register 44540 (09/29/83)	AZ	13172.00
718	48 Federal Register 44539 (09/29/83)	AZ	41.80
719	48 Federal Register 44539 (09/29/83)	AZ	1675.00
720	48 Federal Register 42741 (09/29/83)	NV	194.31
721	48 Federal Register 44938 (09/30/83)	NV	2880565.00
722	48 Federal Register 44786 (09/30/83)	UT	19801.06
723	48 Federal Register 45401 (10/05/83)	AZ	2918.64
724	48 Federal Register 45395 (10/05/83)	AK	5697148.00
725	48 Federal Register 45393 (10/05/83)	NV	20.00
726	48 Federal Register 45394 (10/05/83)	WY	108.97
727	48 Federal Register 45394 (10/05/83)	AZ	
728	48 Federal Register 45608 (10/06/83)	CO	15397.35
729	48 Federal Register 45619 (10/06/83)	CO	65.00
730	48 Federal Register 45618 (10/06/83)	CO	543.68
731	48 Federal Register 45620 (10/06/83)	CO	120.00
732	48 Federal Register 45559 (10/06/83)	WA	113.65
733	48 Federal Register 46107 (10/11/83)	MT	80.00
734	48 Federal Register 46049 (10/11/83)	OR	15814.29
735	48 Federal Register 46050 (10/11/83)	OR	11543.36
736	48 Federal Register 46105 (10/11/83)	NV	4315592.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
737	48 Federal Register 46049 (10/11/83)	UT	40.00
738	48 Federal Register 46627 (10/13/83)	ID	1186700.00
739	48 Federal Register 49022 (10/24/83)	ID	920.00
740	48 Federal Register 50896 (11/04/83)	CA	7439.00
741	48 Federal Register 50895 (11/04/83)	CO	641.76
742	48 Federal Register 50893 (11/04/83)	OR	5631.80
743	48 Federal Register 50894 (11/04/83)	WY	80.00
744	48 Federal Register 50894 (11/04/83)	WY	2553.29
745	48 Federal Register 50895 (11/04/83)	WA	188.09
746	48 Federal Register 53182 (11/25/83)	WY	2215.68
747	48 Federal Register 54618 (12/06/83)	CA	39718.23
748	48 Federal Register 56586 (12/22/83)	ID	279.30
749	48 Federal Register 56754 (12/23/83)	NM	280.00
750	49 Federal Register 2114 (01/18/84)	MI	9.65
751	49 Federal Register 3856 (01/31/84)	N.T	7756.35
752	49 Federal Register 3859 (01/31/84)	AZ	4.53
753	49 Federal Register 3859 (01/31/84)	OR	120.00
754	49 Federal Register 3860 (01/31/84)	OR	30.53
755	49 Federal Register 3858 (01/31/84)	NV	40.24
756	49 Federal Register 3860 (01/31/84)	OR	320.00
757	49 Federal Register 3858 (01/31/84)	ID	400.00
758	49 Federal Register 3859 (01/31/84)	OR	66.00
759	49 Federal Register 4478 (02/07/84)	WY	13.30
760	49 Federal Register 4477 (02/07/84)	OR	15861.17
761	49 Federal Register 4478 (02/07/84)	OR	2997.50
762	49 Federal Register 4478 (02/07/84)	CO	40.00
763	49 Federal Register 4853 (02/08/84)	MT	280.00
764	49 Federal Register 5755 (02/15/84)	AZ	490454.00
765	49 Federal Register 5926 (02/16/84)	OR	47.30
766	49 Federal Register 5924 (02/16/84)	NM	17.50
767	49 Federal Register 5924 (02/16/84)	ID	34850.75
768	49 Federal Register 5923 (02/16/84)	MT	842.92

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
769	49 Federal Register 6907 (02/24/84)	OR	2577.24
770	49 Federal Register 7807 (03/02/84)	NV	172608.00
771	49 Federal Register 12264 (03/29/84)	AK	613.19
772	49 Federal Register 13204 (04/03/84)	ID	779365.50
773	49 Federal Register 17502 (04/24/84)	OR	1805.00
774	49 Federal Register 19904 (05/10/84)	WY	2075788.53
775	49 Federal Register 19906 (05/10/84)	ID	711835.00
776	49 Federal Register 20001 (05/11/84)	AK	499606.00
777	49 Federal Register 20497 (05/15/84)	WA	1219.29
778	49 Federal Register 26052 (05/26/84)	WA	279.46
779	49 Federal Register 26053 (05/26/84)	CA	109.06
780	49 Federal Register 23701 (06/07/84)	CA	135646.00
781	49 Federal Register 24601 (06/14/84)	ID	129189.12
782	49 Federal Register 29601 (06/23/84)	CA	281.41
783	49 Federal Register 29600 (06/23/84)	UT	38.29
784	49 Federal Register 26052 (06/26/84)	OR	911.00
785	49 Federal Register 26231 (06/27/84)	CO	40.00
786	49 Federal Register 28933 (07/17/84)	UT	
787	49 Federal Register 28932 (07/17/84)	CA	1174232.00
788	49 Federal Register 31695 (08/08/84)	AZ	6.40
789	49 Federal Register 32808 (08/16/84)	ID	561087.00
790	49 Federal Register 35773 (09/12/84)	CO	80.00
791	49 Federal Register 36571 (09/18/84)	CO	49.29
792	49 Federal Register 37182 (09/21/84)	CA	73422.00
793	49 Federal Register 37183 (09/21/84)	CA	232920.00
794	49 Federal Register 37759 (09/26/84)	MT	35.00
795	49 Federal Register 37759 (09/26/84)	ID	120.00
796	49 Federal Register 36856 (09/26/84)	AZ	62000.00
797	49 Federal Register 37760 (09/26/84)	MI	3500.00
798	49 Federal Register 38202 (09/27/84)	CA	29693.00
799	49 Federal Register 40031 (10/12/84)	CO	320.00
800	49 Federal Register 40406 (10/16/84)	MT	2750.10

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
801	49 Federal Register 40406 (10/16/84)	CA	540.00
802	49 Federal Register 40407 (10/16/84)	UT	40.00
803	49 Federal Register 42934 (10/25/84)	CA	1076.72
804	49 Federal Register 46144 (11/23/84)	WY	1533.10
805	49 Federal Register 46145 (11/23/84)	MT	120.00
806	49 Federal Register 46959 (11/29/84)	WY	10.00
807	50 Federal Register 895 (01/07/85)	CA	539586.00
808	50 Federal Register 2251 (01/17/85)	MT	99.00
809	50 Federal Register 3760 (01/28/85)	AR	0.62
810	50 Federal Register 4215 (01/30/85)	AK	288.47
811	50 Federal Register 4599 (01/31/85)	CA	520.00
812	50 Federal Register 4600 (01/31/85)	CA	48088.00
813	50 Federal Register 4599 (01/31/85)	CA	264377.00
814	50 Federal Register 5262 (02/07/85)	ID	40.00
*** Total ***			169236048.16

# BLM WITHDRAWAL REVIEW PROGRAM

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A Report of Progress to the  
National Public Lands Advisory Council  
Klamath Falls, Oregon  
May 1985

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U.S. Department of the Interior  
Bureau of Land Management

**Status Report  
Withdrawal Review**

The figures below show the amount of acreage reported to the National Public Lands Advisory Council on March 21, 1985, and the updated acreage figures as of April 30, 1985.

I. Withdrawn Acreage Proposed for Termination or Continuation through BLM Field Review under Section 204(l) of FLPMA (January 1981-April 1985).

	<i>Acreage Proposed for Opening to:</i>		<i>Acreage Proposed for and/or Continuation</i>
	<i>Surface</i>	<i>Mining</i>	
3/85	17,735,648	29,042,287	31,000,000
Current	17,742,909	29,047,316	34,023,084

*Mineral Leasing*

3/85	4,620,299
Current	4,620,846

II. Acreage of Withdrawals Actually Revoked under Section 204(a), (January 1981 thru April 1985)

	<i>Acreage Opening to:</i>		<i>Revoked</i>
	<i>Surface</i>	<i>Mining</i>	
3/85	4,606,700	5,461,144	20,600,000
Current	5,143,597	5,997,706	47,696,202

*Mineral Leasing*

3/85	6,268,967
Current	6,286,913

III. Acreage of Classifications Actually Terminated under Section 202(d) (January 1981 thru April 1985)

	<i>Acreage Opening to:</i>		<i>Reviewed</i>
	<i>Surface</i>	<i>Mining</i>	
3/85	67,186,611	88,981,111	67,823,951
Current	67,267,611	88,981,111	67,717,951

*Mineral Leasing*

3/85	787,511
Current	787,511

<sup>1</sup> These figures represent review of waterpower withdrawals, previous identified with USGS, MINS.  
<sup>2</sup> Includes NOAA, NPS, GSA, VA, BIA, and NASA.  
<sup>3</sup> The March 1985 report was 15,012,996 acres.

AGENCY	1985	1986	1987	1988	1989	1990	TOTAL
BLM <sup>1</sup>	485,484	667,600	552,900	687,200	834,500	770,300	3,997
BR	929,591	889,209	969,908	248,146	353,111	203,816	3,593
AIR FORCE	21,587	121,015	-	-	3,768	-	146
ARMY	2,721,489	20,199	902,256	133,325	787,509	25,260	4,590
COE (civilian)	62,856	65	8,797	-	-	-	71
NAVY	102,659	1,048	-	-	-	-	103
CG	1,356	135	22	39	140	33	1
FAA	2,637	600	40	180	171	-	3
FS	424,984	360,708	689,260	334,487	219,421	-	2,028
DOE	49,979	68,560	3	-	-	-	118
DOA/ARS	5	-	213,671	-	-	-	213
STATE/IBWC	1,260	-	-	-	4,586	200	6
OTHER							
AGENCIES <sup>2</sup>	1,129	4,633	-	-	-	-	2
TOTALS	4,805,016	2,130,722	3,337,127	1,403,377	2,203,206	999,609	14,879

IV.

WITHDRAWAL REVIEW SCHEDULES

FY 1985 to 1990

(in acres)

V. New Withdrawal Activity (Figures include pre- and post-FLPMA totals)

<i>Agency</i>	<i>Acres Withdrawn Since January 1981</i>	<i>Acres Pending Withdrawal</i>
BLM	148,994	1,483,127 <sup>1</sup>
BR	67,036	158,301
FWS	6,282	3,245,461
DOA (FS, SCS)	1,552,823 <sup>2</sup>	141,860
DOD	6,298	7,734,193
GSA		18
NOAA		8,507
BIA		40
NPS		5,655
HUD	6	
FAA		43
DOT		1,292
DOE	8,960	2,555
DOJ	90	11
VA	158	
USGS		101
	<u>1,790,647<sup>3</sup></u>	<u>12,781,164<sup>3</sup></u>

<sup>1</sup> Includes 87,416 acre pending emergency withdrawal, Fort Union coal.

<sup>2</sup> Includes 1,537,000 acre emergency withdrawal in Bob Marshall, Wilderness, Forest Service, later revoked. (This revocation is included in total for Item III.)

<sup>3</sup> The March 1985 report was for 12,784,113 acres.

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF COLUMBIA

Civil No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF

v.

ROBERT F. BURFORD, DONALD P. HODEL, AND UNITED  
STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS

**AFFIDAVIT 1A OF FRANK EDWARDS**

1. I, Frank Edwards, Assistant Director, Land Resources, Bureau of Land Management, U.S. Department of the Interior, Washington, D.C., hereby declare under penalty of perjury that the information contained in this affidavit is true and accurate to the best of my knowledge. The documents referred to in this affidavit are under my direction and control. I have held the position of Assistant Director since October 1982 and have been employed by the Bureau of Land Management for about 29 years. Based upon my past employment with the Bureau and my current job responsibilities, I am familiar with the subject matter of this affidavit and the Bureau procedures and data relating to it.

2. In this affidavit I will discuss the FLPMA section 204(a) authority to revoke withdrawals in relation to federal land withdrawals.

**INTERIOR'S GENERAL AUTHORITY TO  
REVOKE WITHDRAWALS**

3. Before the passage of FLPMA, general land withdrawal authority, including the authority to revoke

withdrawals was vested in the President. This authority was delegated to the Secretary of the Interior by Executive Order No. 10355 of May 26, 1952, 17 F.R. 4831. (Exhibit 1). FLPMA repealed the President's general withdrawal authority and in FLPMA Congress granted to the Secretary of the Interior general authority to make, modify, extend or revoke withdrawals.

4. In 1980, the Office of the Solicitor of the Department of the Interior concluded that the withdrawal review and termination provisions of FLPMA § 204(f) were self-contained and that it was not necessary that all actions taken to end withdrawals be made subject to those provisions. (Exhibit 2). Individual proposed revocations arising in the ordinary course of business of the holding agency, that is to say the agency having administrative jurisdiction over the withdrawn lands, could be processed to completion, pursuant to the separate revocation authority of the Secretary under section 204(a). On the other hand, withdrawals that were subject to the review provisions of FLPMA § 204(f) could not be brought to an end using the Secretary's revocation authority under FLPMA § 204(a).

#### **THE STEPS TAKEN NORMALLY TO REVOKE A WITHDRAWAL UNDER FLPMA SECTION 204(a)**

5. In the past, withdrawal revocations have been initiated by one of three means: a) Departments or agencies holding withdrawals which they no longer need will file a notice of intention to relinquish the reserved lands with the Bureau of Land Management. b) Any member of the public could file a petition requesting revocation of a withdrawal. Now, any member of the public may file a petition to restore and open public lands to the mining laws in cases where the lands are withdrawn for power purposes or reclamation projects. c) In the case of Bureau of Land Management lands that have been previously

withdrawn from the operation of the public land laws and where that protection is no longer required, BLM itself can initiate a revocation proposal. The notice of relinquishment process is set forth in 43 C.F.R. Subpart 2370. The regulations are supplemented by further instructions found in Bureau of Land Management Manual Part 2372. (Exhibit 3).

6. With regard to relinquishments by holding agencies, they are processed in the following manner. Upon receipt of the notice, the Bureau of Land Management's State office will review its contents for regulatory compliance and determine if the information in the notice is sufficient to support the proposed return of the land to Interior's jurisdiction. The State office also will undertake a land status check, based on the federal land records maintained in that office. Additionally, the State office will take whatever steps are necessary to be assured that the official filing the notice was duly authorized and empowered to do so. When these steps have been taken, the notice and the nucleus of the case file will become part of the existing withdrawal case and forwarded to the correct district manager for further processing.

7. The district manager will analyze the sufficiency of the information contained in or accompanying the notice of intention to relinquish. The district manager will make such investigations and undertake such negotiations as are necessary to determine whether the lands have been substantially changed in character by improvements or otherwise and whether the lands are in need of decontamination or protective measures. If so, he will negotiate the terms and conditions for an acceptable agreement for decontamination or protection of the lands. If the lands or resources have been disturbed, the district manager may also negotiate the terms and conditions for an acceptable agreement for reconditioning the lands. Also, if the lands

have been substantially changed in character by improvements or otherwise, determination is made as to whether minerals in the land are suitable for disposition under the mining and mineral laws.

8. The foregoing investigations and negotiations are summarized and incorporated into a land report. Land reports are required for all realty actions. In the case of proposed withdrawal relinquishments and revocations, the land report addresses: where the lands are located, precisely what they have been withdrawn from, why revocation would be appropriate, and to what extent the lands would be opened; a description of the character of the lands; a statement regarding present and expected post revocation land actions or uses; a mineral report, if appropriate; and compliance with the National Environmental Policy Act of 1969 (NEPA). If a recommendation is made not to proceed with a proposed relinquishment and revocation, the report must contain an explanation for the recommendation. Further details as to the revocation process are set forth in Organic Act Directive No. 81-10, dated May 15, 1981. (Exhibit 4).

9. Following completion of the land report, the case file containing it and other documents assembled in processing the proposed relinquishment are returned to the State office with the district manager's recommendation. The State Director will recommend whether the withdrawn land should be returned to Interior's jurisdiction, following revocation, and will inform the holding agency of the recommendation. In some instances the Bureau will condition acceptance of the relinquishment upon the holding agency's compliance with certain specified conditions. The General Services Administration is notified of the Bureau's decision. 43 C.F.R. Part 2370.

10. If it recommends that the reserved lands be relinquished and that the withdrawal be revoked, the State of-

fice prepares a draft public land order (PLO) and a draft transmittal memorandum that will accompany the land report and the order to the Secretary. These documents are submitted to the Regional Solicitor for review. After review for legal sufficiency by the Regional Solicitor, the holding agency is notified in writing that the lands have been found suitable for restoration to their former (pre-withdrawal) status. Thereafter, the case file containing the land report and other documents are forwarded to the Director of the Bureau of Land Management here in Washington, D.C.

11. The Director reviews the submissions from the State Director to ensure compliance with program policy guidance and manual direction. If needed, adjustments are made in the draft public land order. The Solicitor's Office reviews the proposed public land order as to its suitability for the exercise of FLPMA § 204(a) revocation authority. The public land order, then, is forwarded to the Assistant Secretary for Land and Minerals Management along with the Bureau of Land Management's recommendation, transmittal memorandum. The Assistant Secretary reviews these documents, and if he concurs, the public land order revoking the withdrawal will be signed and sent on for publication in the *Federal Register*.

12. Basically, the same process is followed in the case of BLM-initiated revocations, except that since the lands are already under Interior's jurisdiction and control, it is not, of course, necessary to follow all of the relinquishment procedures.

13. Petitions for withdrawal revocations are no longer serialized by the Bureau and treated in accordance with the procedures outlined in the Bureau of Land Management's Manual Part 2371. Instead, such requests are treated as an indication of interest in public land management and land use planning. Therefore, they are referred to the ap-

appropriate field office for consideration as public input into the land use planning process under FLPMA § 202. In this regard, reference may be made to Instruction Memorandum No. 78-233 dated May 1, 1978 (Exhibit 5).

14. The Solicitor's review mentioned above in paragraph 11 was initiated during January of 1983. (Exhibit 6). In brief, a case file will be processed as a FLPMA § 204(a) revocation, as opposed to a FLPMA § 204(l) withdrawal review case file, if: (1) a notice of intention to relinquish was filed before 1980 and there is nothing in the file presented for review to indicate that the relinquishment request was undertaken in anticipation of having to comply with the withdrawal review requirements of FLPMA § 204(l); (2) the lands included in the withdrawal that would be revoked are not located in a FLPMA § 204(l) state (i.e., Alaska or one of the eastern states); (3) the proposed withdrawal revocation pertains to either Bureau of Land Management or U.S. Forest Service lands that are not closed to mining and/or the Mineral Leasing Laws. (e.g., a stock driveway withdrawal); (4) the request to revoke has been brought about in the ordinary course of business of the holding agency (usually this occurs in order to facilitate another land transaction such as an exchange, a sale, or a state in-lieu selection, which could not proceed without revoking the withdrawal); (5) the revocation action is required by an act of Congress; (6) the revocation action is merely a formality to clear the records as to lands that before the enactment of FLPMA had been conveyed out of federal ownership, without concurrent action having been taken to properly conform the land records.

15. Prior to the development in 1978 of categorical exclusions (CEs) by the President's Council on Environmental Quality, 40 C.F.R. 1500 *et seq.*, and the Bureau's development of its CEs in 1981, the Bureau used environmental assessments (EAs) as the principal mechanism

for achieving NEPA compliance in implementing its Section 204(a) authority. As more EAs were prepared, it became clear that they were showing that the mere revocation of a withdrawal did not have a significant impact upon the quality of the human environment.

16. On December 15, 1980, the Bureau published (45 F.R. 82367) its proposed CEs and requested public comment. (Exhibit 7). Six of the proposed CEs related to proposed withdrawal revocations. Six comments were received, including one by the National Wildlife Federation dated January 12, 1981 (Exhibit 8). The Federation commented on three of the proposed CEs, opposed two (where the Secretary is fulfilling a mandatory duty and has no discretion, and where future land actions would be subject to NEPA compliance), supported one (where lands are open to mining but the land has no known mineral value), and were silent on the rest.

17. With some slight modifications, the CEs were issued in final form on January 23, 1981. 46 F.R. 7492. (Exhibit 9). The Federation made no further comment. On December 9, 1981, the Bureau proposed additional CEs and published them for public comment. 46 F.R. 60278. (Exhibit 10). On January 25, 1982, the Federation commented on the proposed CEs, but made no comment on any of the CEs relevant to this case.

#### **POST REVOCATION STATUS OF LANDS INCLUDED IN A SECTION 204(a) WITHDRAWAL REVOCATION**

18. The consequences of revoking a withdrawal vary considerably depending upon individual circumstances. In many cases there will be no change whatsoever. Basically, there are two reasons for this. The lands may be subject to another withdrawal of comparable scope or they may be subject to classification segregations tantamount to such a withdrawal. In that case, the lands would not be opened to

the operation of the public land laws so that the removal of one of the withdrawals has no practical effect. Another reason why there may not be any change is that before the revocation occurred, the lands may have been transferred into private ownership. Consequently, the withdrawal revocation amounts to nothing more than a paper transaction with no substantive impact.

19. In the alternative, a revoked withdrawal may open the lands to the operation of the public land and mineral laws.

20. Some withdrawal revocations are made without prior knowledge as to what subsequent disposition may be made of the lands. After the lands are opened, they might be transferred out of federal ownership by sale, exchange, or some other discretionary mode of disposal, not anticipated when the withdrawal was revoked. These subsequent discretionary actions require separate and independent decisionmaking that, obviously, are divorced from the prior revocation decision. Environmental and other management concerns and public participation are taken into account in relation to the post-revocation decision-making.

21. As noted in paragraph 19, the opening of public lands following the revocation of a withdrawal may also lead to the locating of mining claims under the Mining Law of 1872. The right to go upon the opened lands for the purpose of mineral prospecting, exploration, development, extraction and other uses reasonably incident to mining operations carries with it the requirement to undertake adequate and responsible measures to prevent unnecessary or undue degradation of the federal lands and to provide for reasonable reclamation of those lands. 43 C.F.R. Subpart 3809. Similar regulations apply to national forest reservation lands.

22. Mining operators on project areas causing a cumulative surface disturbance in excess of five acres dur-

ing any calendar year must file a plan of operations with the Bureau of Land Management for its approval. The purpose of the plan is to prevent unnecessary or undue degradation and provide for reasonable reclamation. An EA is prepared by the Bureau to identify the impacts of the proposed operations and to determine whether an EIS is required. The EA also is used to determine the adequacy of mitigating measures and reclamation procedures included in the plan to ensure the prevention of unnecessary degradation of the land. Operations are required to be conducted to prevent unnecessary or undue degradation of the lands and to comply with all pertinent federal and state laws including but not limited to air quality, water quality, solid waste treatment requirements, and the prevention of adverse impacts to threatened or endangered species and their habitat. The regulations also provide that operators shall not knowingly disturb, alter, injure, or destroy any scientifically important paleontological remains or any historical or archaeological sites, structure, building or object on the federal lands. An opportunity is afforded for investigation and salvage of cultural and paleontology values discovered after a plan of operation has been approved or where a plan is not involved.

23. Failure of the operator to either file a plan of operations or to fulfill its terms and conditions subjects the operator to being served with a Notice of Non-compliance and a possible court injunction. 43 C.F.R. 3809.3-2.

24. Operators on project areas causing a cumulative surface disturbance on five acres or less during any calendar year are required to file a Notice. The notice must identify the lands in question, describe the access routes, and steps to be taken to prevent unnecessary or undue degradation of the lands and reclamation of same. The regulations set forth detailed standards relating to environmental protection. 43 C.F.R. 3809.1-3. Operators

are also subject to the noncompliance procedures contained in 43 C.F.R. 3809.3-2.

**STATISTICAL SUMMARY OF SECTION 204(a)  
WITHDRAWAL REVOCATION**

25. Since the passage of FLPMA, 671 public land orders, revoking withdrawals covering 19,957,607 acres of public lands have been issued by Interior. Some of the revoked withdrawals overlapped other withdrawals that remain in effect, hence, the net acreage affected was 17,303,371 acres. The revocation orders were the result of: (1) the disposition of pre-FLPMA withdrawal relinquishment and revocation requests pending at the time FLPMA was enacted; (2) record clearing actions as to lands no longer in government ownership but noted on the official status record as still being withdrawn from disposal under one or more of the public land laws; (3) revocations of withdrawals specifically excluded from review under FLPMA § 204(l); and (4) revocations (not including those mentioned in (1) above) that were made pursuant to the "ordinary course of business" rule, as articulated in the 1980 legal opinion of the Department's counsel.

The aforementioned figures are broken down by states as follows:

<i>State</i>	<i>PLO's</i>	<i>Acres Withdrawals Revoked</i>
Alaska	7	5,748,365
Arizona	36	2,313,868
California	102	563,524
Colorado	39	1,213,882
Idaho	55	382,356
Montana	69	1,587,631
Nevada	28	1,028,795
New Mexico	33	379,070
Oregon	160	303,733
Utah	51	5,423,806
Washington	39	740,904
Wyoming	40	244,648
Eastern States Office	12	27,025
	671	19,957,607

26. Of the 19,957,607 acres on which withdrawals have been revoked, 15,407,495 acres were opened to the operation of one or more of the public land laws. A state-by-state breakdown, showing the various categories to which the lands were opened, is shown on the following chart.

State	Acres Open to Surface Entry Only	Acres Open to Mining Only	Acres Open to Mineral Leasing Only	Acres Open to Mining/ Mineral Leasing Surface Entry	Acres Open to Surface Entry and Mining Only	Acres Open to Mining/ Mineral Leasing Only	Acres Open to Surface Entry/ Mineral Leasing Only
Alas.	0	0	0	5,696,508	0	0	0
Ariz.	217,624	0	13,370	34,826	256,928	0	142,209
Cal.	154,577	19,655	35	1,667	144,355	885	0
Col.	27,463	258,040	0	508,640	111,733	0	0
Id.	101,303	260,487	24	1,567	16,567	0	0
Mon.	18,951	2,617	1,537,320	155	8,656	0	0
Nev.	344,762	0	640	152	240,032	0	0
N.M.	83,588	0	0	1,720	283,835	0	640
Ore.	67,026	15,565	0	393	26,325	0	0
Ut.	289,721	8,226	1,286	648	4,072,230	0	0
Wash.	5,599	143,468	1.0	0	151,923	0	0
Wyo.	11,244	55,083	0	3,720	38,796	0	0
ESO	0	0	10	757	0	0	0
TOTAL	1,321,858	763,141	1,552,686*	6,250,601	5,351,380	885	24,095
							166,944

\* Includes 1,537,320 acres in the Bob Marshall Wilderness Area that on January 1, 1984, was closed to mineral leasing by the Wilderness Act of 1964.

27. In addition to the total set forth in paragraph 26 (15,407,495 acres) withdrawals were revoked on an additional 4,550,112 acres that did not result in the lands remaining open to the operation of the public land laws. The reasons are:

	<i>Acreage</i>
Land selected by States for transfer to State ownership	267,748
Overlapping Withdrawals Kept the Lands Closed	2,654,236
Lands Transferred from Federal Ownership (vast majority transferred prior to revocation)	1,119,640
Record Clearing Only (Lands transferred from Federal ownership prior to the revocation and noted in PLO as "record clearing")	212,205
Other (In aid of legislation; to facilitate resurveys; disposal of excess property; to facilitate inventories of land mineral values)	296,283
<b>TOTAL</b>	<b>4,550,112</b>

28. Withdrawals effecting 15,407,495 acres (the total in paragraph 26) have been revoked since 1976 which have returned the public lands to the operation of the public land laws and an addition 4,450,112 acres (paragraph 27) which did not. Revocations thus covered a total of 19,957,607 acres.

29. Of the 15,407,495 acres that were formally withdrawn and are now open, 12,366,007 acres are open to the operation of the mining law. The following statistical

breakdown, by state, shows the acres opened, the number of mining claims filed with the Bureau, the number of claims on which Notices have been filed (disturbance by mining activities on 5 acres or less), the number of plans of operations filed (disturbance of more than 5 acres), and the number of mineral patents issued (transference of fee title to the mining claimant). Some lands on which withdrawals were revoked opened the lands to all forms of mining; other lands were already opened to some form of mining (metalliferous) and the withdrawal revocation only opened the land to nonmetalliferous mining.:

I. Lands opened to only non-metalliferous mining (already opened to metalliferous mining)  
 II. Lands opened to all forms of mining

Key:

Acres Opened (A)  
 Claims Filed (B)  
 Notices Filed (C)  
 Plans Filed (D)  
 Mineral Patents (E)

State	Totals		
<i>Alaska</i>			
(A)	0	5,696,508	5,696,508
(B)	0	4	4
(C)	0	0	0
(D)	0	0	0
(E)	0	0	0
<i>Arizona</i>			
(A)	190,997	100,757	291,754
(B)	672	1,088	1,760
(C)	1	9	10
(D)	0	4	4
(E)	0	0	0

*California*

(A)	33,472	132,610	167,424
(B)	10	822	832
(C)	2	3	5
(D)	0	13	13
(E)	0	0	0

*Colorado*

(A)	258,640	619,813	878,453
(B)	0	865	865
(C)	0	1	1
(D)	0	0	0
(E)	0	0	0

*Idaho*

(A)	263,296	15,325	278,831
(B)	11	2	13
(C)	0	0	0
(D)	2	0	2
(E)	0	0	0

*Montana*

(A)	7,600	3,828	11,428
(B)	0	11	11
(C)	0	0	0
(D)	0	0	0
(E)	0	0	0

*Nevada*

(A)	141,525	98,659	240,184
(B)	726	134	860
(C)	4	3	7
(D)	0	0	0
(E)	0	0	0

*New Mexico*

(A)	225,527	60,028	285,555
(B)	688	0	688
(C)	1	0	1
(D)	6	0	6
(E)	0	0	0

*Oregon**Washington*

(A)	151,314	186,359	337,673
(B)	5	34	39
(C)	0	14	14
(D)	0	0	0
(E)	0	0	0

*Utah*

(A)	3,990,059	91,334	4,081,393
(B)	301	195	496
(C)	1	0	1
(D)	0	0	0
(E)	0	0	0

*Wyoming*

(A)	68,656	28,943	97,599
(B)	76	0	76
(C)	2	0	2
(D)	0	0	0
(E)	0	0	0

*Eastern States*

(A)	0	757	757
(B)	0	0	0
(C)	0	0	0
(D)	0	0	0
(E)	0	0	0

*Totals:*

(A)	5,331,086	7,034,921	12,366,007
(B)	2,489	3,155	5,644
(C)	11	30	41
(D)	8	17	25
(E)	0	0	0

30. Of the 2,489 claims filed (and the resultant 11 Notices and 8 Plans of Operations) on lands opened only to non-metalliferous mining as a result of the withdrawal revocation, it cannot be determined how many relate only to non-metalliferous claims. The Bureau's mining claim recordation system does not distinguish between non-metalliferous and metalliferous claims. Thus, the actual number of claims, notices, and plans of operations filed on lands opened following the revocations in issue is less than shown in the chart in paragraph 29. We would estimate that approximately 70 to 80 percent of the claims were filed for metalliferous minerals and, thus, were in no way affected by the revocations in issue in this litigation.

31. An analysis of these figures shows that lands opened for the first time to all forms of mining total 7,034,921 acres, or approximately 3% of the total public lands.

32. With regard to the mining claims set forth in paragraph 29, the majority were located in 1983. A bureau-wide and state-by-state breakdown on the mining claims is attached as Exhibit 11. The acreage figures in Exhibit 13 do not necessarily coincide with the acreage figures given in paragraph 29 because the figures in paragraph 29 relate to the total acres opened to the mining laws while the acreage figures in Exhibit 11 relate to the acreage in the public land orders (PLO) opened to the mining laws and only on some of which were claims filed. For example, in Nevada, paragraph 29 shows that 98,659 acres

were opened to all mining with 134 resultant mining claims. Exhibit 11 shows that the 134 mining claims relate only to two PLOs that opened 15,346 acres to all forms of mining. Because of overlapping claims, it is not possible to determine the net acreage impacted by the 134 mining claims; however, Bureau experience shows the average claim is approximately 20 acres. Thus, in this example (land opened to all forms of mining in Nevada), while 98,659 acres were opened, only approximately 2,680 acres were affected by claims. Further, Exhibit 11 shows that for the last three months for which figures are available, only 45 claims have been filed: March 1985—15 claims filed; April 1985—29 claims filed; May 1985—1 claim filed.

33. In summary, the acres affected by or opened to the mining law are as follows:

Acres opened to all or some form of mining	12,366,007
Total mining claims filed	5,644
Actual acreage affected (each claim covering an average of 20 acres; overlapped acreage not calculated)	112,880
41 Notices filed on 5 acres or less (assuming maximum acres possible)	205
25 Plans of Operations (averaging 20 acres)	500

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on this 18th day of August, 1985

/s/ FRANK A. EDWARDS

Frank Edwards  
Assistant Director, Land Resources  
Bureau of Land Management

# Exhibits to the 1 A Edwards Affidavit

STATE: Bureau - 1 - 204(a) - Open to Nonmetaliferous Mineral Entry only

Action Number	Areas opened	Claims located after opening <sup>1</sup>	Operating Under 43 CFR 3809 Notices	Plans	Date of opening order	Number of claims located by year				
						80	81	82	83	1985
										1 2 3 4 5
AK	0	0	0	0						
AZ	190,957	672	1	0			6	386	99	168
CA	2,538	10	2	0				1	2	7
CO	0	0	0	0						
ES	0	0	0	0						
ID	262,687	11	0	2			9		1	1
MT	0	0	0	0						
NV	140,307	726	4	0				236	320	21
NM	223,581	688	1	6					51	439
OR	1,603	5	0	0					5	
UT	3,988,545	301	1	0				39	210	5
WY	18,044	76	2	0			57		19	
Total	4,828,262	2,489	11	8			72	662	707	641
								287	81	20
										16

<sup>1</sup> Claims are located for all forms of commodities under the mining laws.

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Claims are located for all forms of commodities under the mining laws.

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3809 Notices	Plans	Date of opening order	Number of claims located by year				
						80	81	82	83	1985
										1 2 3 4 5
AK	5,696,508	4	0	0						
AZ	76,156	1088	9	4				418	229	323
CA	140,797	822	3	13				373	19	210
CO	568,553	865	1	0				536	164	157
ES	0	0	0	0						
ID	2,042	2	0	0						
MT	189	11	0	0						
NV	15,346	134	3	0						
NM	0	0	0	0						
OR	1,400	34	14	0						
UT	49,781	195	0	0						
WY	0	0	0	0						
Total	6,550,772	3,155	30	17						

STATE: Bureau - 11 - 204(a) - Open to All Mineral Entry

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STATE: Alaska - Land Opened under 204(a) of FLPMA  
 I. Opened only to Nonmetallic Mineral Entry, (already open to metallic mineral entry).

II. Opened to All Mineral Entry.

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3809 Notices	Date of opening order	Number of claims located by year				
					1985	1	2	3	4

I None

II 6477 5,696,508 4 0 0 11/9/83

1 3

Claims are located for all forms of commodities under the mining laws.

STATE: Arizona - Land Opened under 204(a) of FLPMA  
 I. Opened only to Nonmetallic Mineral Entry, (already open to metallic mineral entry)  
 II. Opened to All Mineral Entry.

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3809 Notices	Plans	Date of opening order	Number of claims located by year				
						80	81	82	83	1984
I	6156 5976 6281	1,300 189,657	3	0	0	3-16-82 8-05-81	3			
		669	1	0	6-16-82	6	384	96	168	
II	5689 5868 6442 6353	4,399 32,246 21,952 17,559	222 449 1 416	1 1 0 7	0 0 0 3	1-16-80 6-20-81 8-23-83 3-3-83	222 418	16	8	
						307	106	3		

Claims are located for all forms of commodities under the mining laws.

STATE: California - Land Opened under 204(a) of FLPMA  
 I. Opened only to Nonmetalliferous Mineral Entry, (already open to metalliferous mineral entry).  
 II. Opened to All Mineral Entry.

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 1809 Notices	Plans	Date of opening order	Number of claims located by year				
						1985	1	2	3	4
I.	5941	2,113	3	0	0	06-23-81	3			
S 5050	25	4	0	0	08-02-82	4				
R 2506	280	1	0	0	07-27-82	1				
R 2507	46	1	0	0	03-25-82	1				
6042	80	1	2	0	11-06-81	1				
II.	6402	1,251	72	0	07-23-83	68	4			
5895	120	4	0	0	06-23-83	4				
5791	74,553	512	0	13	01-23-81	76				
2355	38,035	128	0	0	04-21-81	25				
5934	77	14	3	0	06-23-81	8				
5644	38	2	0	0	08-11-78	2				
5633	40	6	0	0	05-04-78					
5935	1,028	1	0	0	06-23-81	1				
R 22	9,002	4	0	0	05-31-77					
R 2565	1,742	1	0	0	04-21-81	4				
6400	2,932	38	0	0	12-02-83	10	4			8
5932	7,421	17	0	0	06-23-81	2				
S 4928	440	1	0	0	10-30-79	1				
6393	40	2	0	0	07-22-83	2				
6336	39	17	0	0	10-07-82	11				
6446	225	1	0	0	08-23-83	1				
5930	3,814	1	0	0	06-23-81	1				

Claims are located for all forms of commodities under the mining laws.

STATE: Colorado - Land Opened under 204(a) of FLPMA  
 I. Opened only to Nonmetalliferous Mineral Entry, (already open to metalliferous mineral entry).  
 II. Opened to All Mineral Entry.

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 1809 Notices	Plans	Date of opening order	Number of claims located by year				
						1985	1	2	3	4
I.	None									
II.	5867	21,993	607	0	05-15-81	436				
6103	5,745	72	0	0	01-28-82	20				
6168	820	6	0	0	02-08-82	2				
6170	29,972	25	0	0	02-10-82	21				
6194	40	2	0	0	03-02-82	4				
6235	1,343	5	0	0	04-12-82	1				
6387	508,640	148	1	0	05-16-83	148				

Claims are located for all forms of commodities under the mining laws.

STATE: Idaho—Land Opened under 204(a) of FLPMA  
 I. Opened only to Nonmetallic Mineral Entry, (already open to metallic mineral entry).

II. Opened to All Mineral Entry.

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3009 Notices	Plans	Date of opening order	Number of claims located by year				
						80	81	82	83	84
I	5680	262,687	11	0	2	10-05-79	9	1	1	1
II	6150	2,042	2	0	0	02-08-82		2		

Claims are located for all forms of commodities under the mining laws.

Claims are located for all forms of commodities under the mining laws.

STATE: Montana—Land Opened under 204(a) of FLPMA  
 I. Opened only to Nonmetallic Mineral Entry, (already open to metallic mineral entry)  
 II. Opened to All Mineral Entry

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3009 Notices	Plans	Date of opening order	Number of claims located by year				
						80	81	82	83	84
I	None									
II	5836 5986 6191	40 4 145	7 7 7	0 0 0	0 0 0	02-20-81 10-07-81 04-07-82				

STATE: Nevada - Land Opened under 204(a) of FLPMA  
 I. Opened only to Nonmetallic Mineral Entry, (already open to metallic mineral entry).  
 II. Opened to All Mineral Entry.

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3809 Notices Plans	Date of opening order	Number of claims located by year				
					80	81	82	83	1985
I.									
6134	80	3	0	02-05-82			3		
6108	39,310	121	0	01-28-82				121	
6081	84,142	598	4	11-02-81			229	199	21 149
5976	16,775	4	0	06-30-81			4		
5980	130	19	0	05-18-81		9	2	8	
5664	15,216	115	3	06-07-79	27	18	50		24
II									

Claims are located for all forms of commodities under the mining laws.

STATE: New Mexico - Land Opened under 204(a) of FLPMA  
 I. Opened only to Nonmetallic Mineral Entry, (already open to metallic mineral entry).  
 II. Opened to All Mineral Entry.

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3809 Notices Plans	Date of opening order	Number of claims located by year				
					80	81	82	83	1985
I.									
6459	223,581	688	1	0	10-07-83				
II.									
None									

Claims are located for all forms of commodities under the mining laws.

STATE: Oregon - Land Opened under 204(a) of FLPMA  
 I. Opened only to Nonmetalliferous Mineral Entry, (already open to metalliferous mineral entry).  
 II. Opened to All Mineral Entry.

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3809 Notices	Date of opening order	Number of claims located by year					
					80	81	82	83	84	1985

I	6282	1,603	5	0	0	0	0	0	0	0
II	5886	520	8	1	1	1	1	1	1	1
	5804	690	13	0	0	0	0	0	0	0
	6124	83	4	0	0	0	0	0	0	0
	5833	4	1	0	0	0	0	0	0	0
	6088	60	4	0	0	0	0	0	0	0

Claims are located for all forms of commodities under the mining laws.

STATE: Utah - Land Opened under 204(a) of FLPMA  
 I. Opened only to Nonmetalliferous Mineral Entry, (already open to metalliferous mineral entry).  
 II. Opened to All Mineral Entry.

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3809 Notices	Date of opening order	Number of claims located by year					
					80	81	82	83	84	1985

I	6313	3,988,505	300	1	0	0	0	0	0	0
	6274	40	1	0	0	0	0	0	0	0
II	6149	39,916	17	0	0	0	0	0	0	0
	5850	8,360	101	0	0	0	0	0	0	0
	6023	1,278	59	0	0	0	0	0	0	0
	6032	227	18	0	0	0	0	0	0	0

Claims are located for all forms of commodities under the mining laws.

STATE: Wyoming - Land Opened under 204(a) of FLPMA  
 I. Opened only to Nonmetalliferous Mineral Entry, (already open to metalliferous mineral entry).

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3809 Notices	Date of opening order	Number of claims located by year					
					1980	81	82	83	84	1985
I.	5995 6220	2,367 15,677	75 1	2 0	09-04-81 03-12-82	57		18 1		

II. None

Claims are located for all forms of commodities under the mining laws.

UNITED STATES DISTRICT COURT  
 FOR THE  
 DISTRICT OF COLUMBIA

Civil No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF

v.

ROBERT F. BURFORD, DONALD P. HODEL, AND THE UNITED  
 STATES DEPARTMENT OF THE INTERIOR, DEFENDANT

AFFIDAVIT IB OF FRANK EDWARDS

1. I, Frank Edwards, hereby declare under penalty of perjury that: I am the Assistant Director, Land Resources, of the Bureau of Land Management, U.S. Department of the Interior and have held that position since October 1982. I have been employed by the Bureau for about 29 years. I am acquainted with the facts in this case and swear and affirm that the information contained in this affidavit is true and accurate to the best of my knowledge.

2. In this affidavit I will discuss the FLPMA section 204(f) withdrawals review process in relation to federal land withdrawals.

3. To "withdraw" the public lands means to remove specific public lands from the operation or effect of one or more of the public land laws and/or to reserve them for a specific purpose. During the past century, numerous withdrawals were issued. Whether to continue, modify, or terminate these withdrawals was an unanswered question that eventually led to the enactment of section 204(f) of FLPMA.

4. By the end of 1958, review of withdrawals had been established as a matter of Interior policy. Part 603 of the Departmental Manual at 603.1.4 provided: "The Bureau of Land Management in cooperation with other agencies as well as interested bureaus of the Department, is responsible for the development of long-range plans and procedures for complete inventory of all current withdrawals and for systematic periodic review of such withdrawals." (Exhibit No. 1).

5. Procedures implementing Departmental Manual section 603.1.4 were promulgated shortly thereafter in BLM Manual, Volume V, Chapter 4.23, 7/18/62. The following steps were established for systematic review of withdrawals:

- a. identification of individual withdrawals and reservations, their recordation for control purposes, and creation of individual case files containing all available office information;
- b. assessment of withdrawals or reservations utilizing program development information secured from office records, land use analyses, holding agencies, and field examinations;
- c. review and comment by the holding agency preceded by discussions when necessary to facilitate review;
- d. completion of progress reports and action programs;
- e. cycling the review on a continuing basis as needed;
- f. continue processing of requests for revocations in accord with existing procedures; and
- g. implementation by state directors of mechanics for conducting withdrawal review. (Exhibit No. 2).

6. During the twenty years which preceded the enactment of Section 204(h) of FLPMA, the Department's

withdrawal review was only partially successful, although some progress had been made during the period beginning in 1956 up until 1961. (Exhibit No. 3).

7. On September 19, 1964, Congress established the Public Land Law Review Commission (Commission) for the purpose of studying existing laws and procedures relating to the administration of the public lands of the United States.

8. In 1970, the Commission recommended that Congress establish a statutory program by which existing withdrawals could be periodically reviewed with the objective of continuing, modifying, and/or revoking withdrawals. The Commission's recommendation was extremely important: (a) it would elevate the Bureau's withdrawal review to the level of legislation empowering the Department to implement a systematic review and (b) it gave Interior authority over outside holding agencies, who in the past, had tended not to cooperate with the Department fully in fulfilling the objectives of withdrawal review. (Exhibit No. 4).

9. The 204(h) withdrawal review of FLPMA evolved from the Commission's recommendation and was first set forth in section 404 of H.R. 13777, 94th Cong., 2d Sess., the House-passed version of FLPMA. Originally, two proposals were suggested by the framers of FLPMA to establish a withdrawal review process. The first proposal called for the creation of an independent withdrawal review commission. The second proposal was somewhat shorter, and, with a few modifications incorporated during the conference process, became section 204(h) of FLPMA.

#### IMPLEMENTATION OF FLPMA SECTION 204(h)

10. Procedures implementing section 204(h) began to be developed in 1977 when other agencies were notified about the existence of the program and their cooperation sought. Letters were sent to the Department of the Army, Department of the Navy, Department of the Air Force, the

U.S. Corps of Engineers, Department of Agriculture and the Department of Transportation. (Exhibit No. 5).

11. In September of 1977, Organic Act Directive (OAD) No. 77-69 (Exhibit No. 6), which outlined the procedures for conducting an inventory of withdrawals, was issued for comment. Section .06 of that Directive provided for the "comprehensive, detailed, orderly review" of withdrawn land which had been designated for review under section 204(f) of FLPMA. The inventory requirements included a review of master title plats (MTPs), General Services Administration real property reports, Forest Service land records, and holding agency records to determine which withdrawals would be reviewed. Section .11 describes the procedures for conducting the inventory review.

12. In January of 1978, draft regulations implementing the 204(f) process were prepared and forwarded by the Lands Division of the Bureau to the Bureau Organic Act Policy Committee for review. The draft regulations were designed to implement the stated congressional policy objectives contained in section 102 of FLPMA and to "define and describe the review and evaluation directive contained in section 204(f)." (Exhibit No. 7).

13. In February of 1978, comments were received from the Division of Legislative and Regulatory Management of the Bureau (Exhibit No. 8) recommending that regulations not be promulgated to implement section 204(f).

14. By March of 1978, OAD No. 77-69 (Par. No. 10 above) had been revised by OAD No. 78-13. (Exhibit No. 9). The revisions were minor and included: a modification of the step 4 inventory review process to give the Director of the Bureau authority to resolve disputes regarding whether a particular withdrawal should be subject to review.

15. OAD No. 79-28 (Exhibit No. 10) was issued in April of 1979. It discussed the establishment of withdrawal review priorities as well as a three-stage or phase process for conducting withdrawal reviews. Under OAD No. 79-28, priority was to be given to inventorying and reviewing all withdrawals specified in Section 204(f).

16. OAD No. 79-28 also described in detail three phases of withdrawal review:

(a) Inventory. The first phase includes the identification of withdrawals and a determination of whether the withdrawal is subject to review under section 603 of the Departmental Manual or section 204(f) of FLPMA. OAD No. 79-28 also detailed nine steps for conducting the inventory. (Exhibit No. 10 at Encl. 1-13 to 1-16).

(b) Verification/Reconciliation. This second phase provides for the notification to the field offices of the various holding agencies of the withdrawal review process and providing such agencies with inventory data. (Exhibit No. 10 at Encl. 1-17).

(c) Rejustification and Review. This third phase consists of developing schedules for review, rejustification for continuation or extending withdrawals, coordinating the review with holding agencies and preparing recommendations. The entire process is comprised of 20 steps beginning with a prejustification review by the Bureau District Office and culminating with the cases being transmitted to the Secretary's Office in Washington for review and recommendation (Exhibit No. 10, Encl. 1-24 to 1-29).

17. In April of 1979, the need for regulations implementing the 204(f) withdrawal review was again discussed. (Exhibit No. 11). The decision to issue regulations was debated at the staff level until June of 1979. At

that time, a second decision was made not to issue regulations by the Deputy Director for Lands and Resources.

18. In October of 1979, OAD No. 79-28, Change 1, was promulgated (Exhibit 12) to streamline supporting documentation requirements, e.g., OAD No. 79-28 required a mineral report to be submitted by holding agencies during the rejustification phase (See Exhibit No. 10 at Encl. 1-33). OAD No. 79-28, Change 1, still required the submission of a mineral report by holding agencies, however, if a United States Geological Survey report was available, it could be substituted in lieu thereof.

19. By January of 1980, the inventory of withdrawals was completed and a summary report prepared. (Exhibit No. 13). The report stated that an initial determination indicated that 67.9 million acres of withdrawn lands would be subject to review under section 204(f). Of the 67.9 million acres, 54.2 million were segregated from mineral location under the 1872 Mining Law and 18.9 million acres were segregated from mineral leasing under the 1920 Mineral Leasing Act. Many of these acres overlapped. The total number of withdrawals was 7,911.

20. The inventory report was transmitted to Congress on January 16, 1980, informing the respective Chairmen of the House Committee on Interior and Insular Affairs and Senate Committee on Energy and Natural Resources of the completion of the inventory. (Exhibit No. 14).

21. Withdrawal review procedures were often updated and revised (Exhibit Nos. 15, and 16), *inter alia*, streamlining the review procedures and providing details on how case files were to be transmitted from State offices to the Secretary and thereafter to the President and eventually to Congress.

22. In October of 1980, the Office of the Solicitor clarified the distinction between section 204(a) revocations and section 204(f) terminations. (Exhibit No. 17). The

opinion traced the legislative history of both sections and concluded that individual proposed revocations of withdrawals by holding agencies which arise during the "ordinary course of business" could be processed under the Secretary's revocation authority under section 204(a) of FLPMA rather than the self-contained termination provisions of 204(f).

23. In December of 1980, a revised report containing updated inventory data was transmitted to the appropriate Chairmen of the House and Senate Committees with oversight responsibility for withdrawal review (Exhibit No. 18). The new report refined the initial data to indicate 6,123 withdrawals comprising 51.9 million acres of land were subject to review under section 204(f).

24. In March of 1981, OAD 81-4 (Exhibit No. 19) was promulgated establishing withdrawal review priorities and target dates: (1) fiscal year (FY) 1981—complete field processing of all pre-FLPMA and other Federal holding agency withdrawal relinquishments (217 cases totaling 2.5 million acres) and commence systematic review of Bureau withdrawals which have high mineral potential; (2) FY 1982—complete field review and processing for all Bureau withdrawals, (1,317 withdrawals totaling 24 million acres); (3) FY 1983—implement 9-year schedule for review of other agency withdrawals. In order to meet the 1991 deadline mandated by FLPMA, the directive anticipated that 500-600 withdrawals had to be reviewed each year. To carry out this responsibility, additional funding (approximately 2.1 million dollars) was allocated and 56 new staff persons were hired to work in field offices throughout the country on withdrawal review.

25. OAD No. 81-10 was distributed to field offices in May of 1981 (Exhibit No. 20) and supplied guidance on: the use of categorical exclusions; the preparation of mineral and land reports; criteria for determining whether

a withdrawal should be revoked or continued; differentiating among types of withdrawals and their authorities for review; and the composition of revocation case files.

26. By May of 1982, Bureau procedures for withdrawal review were incorporated into and superseded by Bureau Manual, Section 2355 (Exhibit No. 21). Section 2355 of the manual incorporated OAD Nos. 79-28, Changes 1, 2, and 3, and OAD Nos. 81-4, 81-10, and 81-11. The basic criteria for reviewing withdrawals was modified by the manual. Reviewers were instructed to determine: 1) for what purpose were the lands withdrawn; 2) whether the purpose was still being served; and 3) whether the lands were suitable for return to the public domain (*e.g.*, not surplus property or contaminated).

27. In July of 1982, Federal holding agencies were contacted in an effort to encourage such agencies to complete schedules for withdrawal review before the end of the current fiscal year and to begin a systematic review of each withdrawal by early FY 1983 (Exhibit No. 22). Agencies were asked to compile a brief report regarding the status of the withdrawal review, detail problems and offer suggestions for improvement. If funding for conducting withdrawal review was a potential problem, the Department offered to assist the holding agencies to obtain additional funding.

28. In October of 1982, the General Accounting Office (GAO) released a report (Exhibit No. 23) which indicated that relatively little land was being opened to mineral entry despite the emphasis in section 204(f) of FLPMA on the review of withdrawals which closed the land to mining and mineral leasing. The report stated:

[B]y reviewing all BLM land first, including those lands already opened to mineral entry, many lands closed to mineral exploration and development and specified for review by the Congress have not yet been

reviewed. Congressional objectives could have been better met by now if BLM had allocated program resources proportionately to those States with the most withdrawn acreage needing review and the best potential for mineral development rather than on the basis [*sic*] numbers of withdrawal cases to be reviewed.

29. By January of 1983, the Office of the Solicitor began to review all withdrawal revocations and modifications to determine if actions taken by the Bureau were in conformance with the section 204(f) review requirements. (Exhibit No. 24). The Bureau was instructed to be prepared to justify all proposed revocations under the 204(a) "ordinary course of business" process by explaining in detail how the proposed action arose.

30. Instruction Memorandum (IM) No. 83-429 (Exhibit No. 25) issued in April of 1983, provided guidance on what constituted proper justification to continue a withdrawal which closed lands to mining and mineral leasing.

31. In May of 1983, procedures developed by the Bureau for transmitting 204(f) review packages to the President and Congress were approved by the Assistant Secretary. (Exhibit No. 26). In October 1983, I participated in briefing the appropriate House and Senate Committees staffs and obtained agreement on these procedures.

32. In December of 1983, the initial package of 34 cases of 204(f) recommended withdrawal terminations were forwarded by the Bureau, through the Assistant Secretary, to the Secretary for review and recommendations. Nine more packages followed soon thereafter.

33. In March of 1984, the National Public Lands Advisory Council passed a resolution recommending that the Secretary of the Interior take the necessary action to assure that other agencies establish and maintain a firm

schedule to complete the withdrawal reviews prior to the 1991 deadline. (Exhibit 27.)

34. In May of 1984, staff from the Department's Office of Congressional and Legislative Affairs and I met with OMB to discuss and obtain agreement on the withdrawal review reports and procedures. No written record of this meeting was made.

35. In January of 1985, seven 204(l) packages were forwarded by the Secretary to the Office of Management and Budget (OMB) for review. Three other 204(l) packages were still being reviewed in the Office of the Secretary.

36. In June 1985 a note was sent to OMB from the Deputy Assistant Secretary, Land and Minerals Management, requesting that the seven 204(l) packages be returned to BLM. (Exhibit 28.)

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on this 18th day of August, 1985.

/s/ FRANK EDWARDS  
Frank Edwards

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF COLUMBIA

Civil No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF

v.

ROBERT F. BURFORD, DONALD P. HODEL, AND THE UNITED  
STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS

**AFFIDAVIT IC OF FRANK EDWARDS**

1. I, Frank Edwards, hereby declare under penalty of perjury that I am the Assistant Director, Land Resources, Bureau of Land Management, U.S Department of the Interior, Washington, D.C., having served in that capacity since October, 1982. I have been employed by the Bureau of Land Management for about 29 years. Based upon my past employment with the Bureau and my current job responsibilities, I am familiar with the subject matter of this affidavit and the Bureau procedures and data relating to it. The information contained in this affidavit is true and accurate to the best of my knowledge, information and belief.

**LAND CLASSIFICATIONS - BACKGROUND**

2. Broad authority to classify public lands and to determine their suitability for disposal or retention for federal management was first granted to the Department of the Interior by the Taylor Grazing Act of 1934. When the statute was enacted, recognition was given for the first time to the need for conservation and management of size-

able portions of the remaining unappropriated public lands.

3. Subsequently, the President issued Executive Orders 6910 (1934) and 6964 (1935) which withdrew from disposition for general classification purposes virtually all of the remaining unappropriated public lands, including the grazing districts established by the Taylor Grazing Act. However, the President modified Executive Order No. 6910 to remove the grazing districts from its scope. (Executive Order No. 7274 (1936)).

4. In 1936, Congress amended section 7 of the Taylor Grazing Act to include the unappropriated public land areas in the contiguous States covered by the Executive Orders, as well as the grazing districts, and to broaden Interior's classification authority in keeping with the Executive Orders. As amended, section 7 provided that public lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry. Under the sweeping authority of Section 7, as amended, one could not dislodge the Government's title under the public land laws without first obtaining a favorable classification decision from Interior. Conversely, an unfavorable decision led to continued retention of the particular public land area involved in the classification request.

5. In 1964, Congress enacted the Classification and Multiple Use (C&MU) Act which called upon the Secretary of the Interior to review the public lands to determine which land shall be classified as suitable for disposal and which land should be retained in federal ownership. This act expired in 1970.

6. Simultaneously with the passage of the C&MU Act, Congress also established the Public Land Law Review Commission and declared that the public lands of the United States should be retained and managed or disposed

of in a manner to provide the maximum benefit for the general public. Thus, a new policy of balanced retention and disposal was introduced in relation to the management of the public lands.

7. In addition to the Taylor Grazing Act and the C&MU Act, other statutes were enacted pursuant to which Interior was required to take classification actions. The most notable of these statutes were the Public Land Sale Acts, the Small Tract Act of 1938, and the Recreation and Public Purposes Act. Only the latter statute survives today.

8. Interior, acting through the Bureau, had to review hundreds of millions of acres of public lands to make its determinations leading to classification for retention or disposal, before the C&MU Act expired in 1970 by its own terms. Bureau officials undertook immediately to develop procedures and published final rulemaking for classifications in October of 1965. Development of the regulations involved extensive public participation in which 65 public meetings were held throughout the Western States. With minor revisions in 1968 and 1970, the regulations remain essentially the same today as they were when issued in 1965.

9. As the regulations were being developed, Bureau of Land Management officials also sought to develop land use plans concurrently with the classification review. The land use planning system was underway by the time that most of the C&MU Act classifications had been ordered into effect.

10. According to a 1972 Bureau report, a total of 177,630,329 acres were classified under the C&MU Act. Lands classified for retention were typically segregated against agricultural entries and sale under the public sale acts. Less than two percent of the lands classified were segregated against mining. (Exhibit 1).

11. The fact that the Bureau was not wholly successful in making its classifications on the basis of planning recommendations was recognized by the Public Land Law Review Commission in its final report, *One-Third of the Nation's Land, A Report to the President and the Congress*, published in June of 1970. Recognizing "that BLM acted under a congressional mandate to make its classifications as soon as possible pursuant to an authority of temporary duration", the Commission said:

Despite the obvious need for careful planning, it is apparent that [the classifications] were made in a hurried manner on the basis of inadequate information.

It was found that, for various reasons of expediency, the Bureau concentrated on large scale retention with little land use planning on its part and virtually none on the part of local and state planning authorities (although coordination was effected with them). Thus, the classifications were not preceded by necessary comprehensive efforts to gather information pertinent to resource capabilities and future development probabilities or by systematic attempts to state alternative uses within the context of regional or state development goals.

Commission's report p. 53. (Exhibit 2)

12. However, as pointed out by the Commission, the classifications were not irrevocable, and they could be changed by the Bureau's new land use planning system as it became more refined. (Exhibit 2) This remedial approach is reflected in the provisions of section 202(d) of the Federal Land Policy and Management Act of 1976.

13. Moreover, in response to applications filed under 43 C.F.R. 2400, Bureau officials were free to examine tracts of land and determine whether the tracts were still

proper for retention in federal management or more suitable for use or disposal under appropriate statutory authority. Such determinations generally were made and were based on field reports and environmental studies prepared in accordance with the Bureau's manual requirements. Upon finding that particular public lands were suitable for disposal, the authorized officer would reclassify the lands for such purposes. In this manner, substantial acreages of public land eventually were transferred out of federal ownership under various disposal statutes, although initially they had been classified for retention under the C&MU Act.

#### LAND CLASSIFICATIONS UNDER FLPMA—SECTION 202(d)

14. Many of the recommendations contained in the 1970 report of the Public Land Law Review Commission were absorbed into the Federal Land Policy and Management Act (FLPMA), including the concept that the public lands should be retained in Federal ownership, unless as a result of the land use planning, it is determined that disposal will serve the national interest. Further, any classifications of public lands or any land use plan in effect when FLPMA was passed were to be reviewed in the land use planning process. Also, the Secretary was expressly authorized to modify or terminate any such classification consistent with such land use plans.

15. In 1979, the Bureau issued a first draft of what subsequently would become section 2355 of the Bureau's manual. This draft was distributed as an instruction memo in manual format (Exhibit 3) and provided that classifications may be reviewed under the existing planning process and the land use planning activity called for by § 202(a) of FLPMA. A second draft version of the Bureau's manual section 2355 was distributed in 1980. (Exhibit 4). This second version did not alter the first draft insofar as how

classifications were to be reviewed. It was on this basis that the vast majority of classifications were examined under Interior's post-FLPMA classification review.

16. In 1980 the Office of the Solicitor for the Department expressed the view that the FLPMA § 204(f) review was not intended to be applied to lands segregated as a result of C&MU Act retention classification decisions, and that Interior was to review C&MU classifications under the land use planning procedures of FLPMA. (Exhibit 5). Henceforth, all classifications were to be reviewed under the land use planning procedures of FLPMA §§ 202(a) and 202(d). OAD No. 78-49 Chg. 1, July 7, 1981 (Exhibit 6).

17. Initially, classification reviews covering over 1,400 classification notices, were to be completed before the end of FY 1992, as part of the Bureau of Land Management's planning process. OAD No. 81-4, dated March 2, 1981 (Exhibit 7). However, in June of 1981 classification review was accelerated. Four criteria were established, OAD No. 81-11, dated June 18, 1981 (Exhibit 8), for the termination of classifications having segregative effect:

a. The classification notice does not include any segregative language, e.g., it merely states "classified for retention".

b. The notice segregates against applications under laws which were repealed by FLPMA.

c. The classification notice segregates against discretionary land laws and a Management Framework Plan (MFP), Resource Management Plan (RMP), or special area plans such as the plan for the California Desert, is in place and provides an adequate basis for acting on applications which may be filed under those laws.

d. The classification notice segregates against the operation of the mining laws, but the Bureau of Land

Management has determined that the lands involved do not contain minerals of more than nominal value and there has been no serious interest expressed in mineral development. For lands containing minerals known or believed to be of more than nominal values other specially-referenced principles apply.

18. OAD 81-11 also provided that classifications not meeting the four criteria may be left intact pending the completion of the necessary management plans. Further, it states that when completed the plans "*must* provide the specificity needed to: (a) effect conformance determinations . . . and (b) obviate the necessity for continuing classifications made under elapsed statutes." (Emphasis in the original.) (Exhibit 8)

19. The 1972 report (Exhibit 1) identified over 177 million acres as having been classified. Of this total, the BLM has reviewed 167,781,998 acres since 1976. Of this latter figure, classifications have been terminated on 160,833,438 acres. These figures are broken down by states as follows:

<i>State</i>	<i>Classification Acres Reviewed</i>	<i>Classification Acres Terminated</i>
Alaska	32,625,000	32,625,000
Arizona	10,532,848	10,532,848
California	2,609,054	2,460,636
Colorado	6,618,096	6,611,620
Idaho	5,210,046	5,206,406
Montana	5,201,297	5,197,520
Nevada	39,882,870	39,670,798
New Mexico	8,974,939	8,900,622
Oregon	13,444,337	9,549,621
Utah	29,938,546	27,343,457
Washington	25,809	23,986
Wyoming	12,719,156 [sic]	23,710,924
Eastern States	0	0
TOTALS	167,781,998	160,833,438

20. Of the 160.8 million acres on which classifications have been terminated, 819,876 acres have been opened to the operation of the mining laws and 96,030 acres had been opened to the operation of the mineral leasing laws. On a state-by-state basis, this break down is as follows:

<i>State</i>	<i>Acres Open to Mining Location</i>	<i>Acres Open to Mineral Leasing</i>
Alaska	0	0
Arizona	109,095	36,946
California	73,810	0
Colorado	20,501	0
Idaho	17,535	0
Montana	16,097	0
Nevada	141,888	213
New Mexico	32,131	53,673
Oregon	138,507	5,198
Utah	176,685	0
Washington	3,743	357
Wyoming	89,884	4,300
Eastern States	0	0
<b>TOTALS</b>	<b>819,876</b>	<b>96,030</b>

21. With regard to lands that have been opened to the operation of the mining laws, following is a state-by-state breakdown, showing acres opened to the mining laws, the mining claims located, the number of notices filed (mining activities disturbing 5 acres or less), plans of operations (disturbing more than 5 acres) and mineral patents issued.

**Lands Opened due to  
Land Classification  
202(d) Terminations  
(for all mining)**

**Key:**

Acres Opened (A)

Claims Filed (B)

Notices Filed (C)

Plans Filed (D)

Mineral Patents (E)

<i>State</i>	<i>Totals</i>
<b>Alaska</b>	
(A) .....	0
(B) .....	0
(C) .....	0
(D) .....	0
(E) .....	0
<b>Arizona</b>	
(A) .....	109,095
(B) .....	69
(C) .....	1
(D) .....	0
(E) .....	0
<b>California</b>	
(A) .....	73,810
(B) .....	445
(C) .....	5
(D) .....	0
(E) .....	0
<b>Colorado</b>	
(A) .....	20,501
(B) .....	84
(C) .....	1
(D) .....	0
(E) .....	0

Idaho	
(A) .....	17,535
(B) .....	31
(C) .....	0
(D) .....	0
(E) .....	0
Montana	
(A) .....	16,097
(B) .....	1
(C) .....	0
(D) .....	0
(E) .....	0
Nevada	
(A) .....	141,888
(B) .....	149
(C) .....	9
(D) .....	1
(E) .....	0
New Mexico	
(A) .....	32,131
(B) .....	0
(C) .....	0
(D) .....	0
(E) .....	0
Oregon	
Washington	
(A) .....	142,250
(B) .....	34
(C) .....	4
(D) .....	0
(E) .....	0
Utah	
(A) .....	176,685
(B) .....	25
(C) .....	0
(D) .....	0
(E) .....	0

Wyoming	
(A) .....	89,884
(B) .....	406
(C) .....	3
(D) .....	1
(E) .....	0
Eastern States	
(A) .....	0
(B) .....	0
(C) .....	0
(D) .....	0
(E) .....	0
Totals	
(A) .....	819,876
(B) .....	1,244
(C) .....	23
(D) .....	2
(E) .....	0

22. Attached as Exhibit 9, is a further breakdown, state-by-state, of the timing relating to filing of mining claims from date of termination (through May 1985) and their locations. The acreage figures in Exhibit 9 do not necessarily coincide with the acreage figures given in paragraph 21 because the figures in paragraph 21 relate to the total acres opened to the mining laws while the acreage figures in Exhibit 9 relate only to the acreage in the classification notices that were opened and on some of which claims were filed. For example, in Idaho, paragraph 21 shows that 17,535 acres were opened to all forms of mining with 31 resultant mining claims. Exhibit 9 shows that the 31 mining claims relate only to two classification notices that opened 910 acres to all forms of mining. Because of overlapping claims, it is not possible to determine the net acreage impacted by the 31 mining claims; however, Bureau experience shows the average claim is ap-

proximately 20 acres. Thus, in this example, (lands opened to all forms of mining in Idaho) while 17,535 acres were opened, only approximately 620 acres were affected. Further, as can be seen, the total claims in Exhibit 9 located in 1985 have been few: January 1985—27 claims located; February 1985—12 claims located; March 1985—2 claims located; April 1985—8 claims located; and May 1985—0 claims located.

23. In summary, the total acres affected by or opened to the mining law are as follows:

Acres opened to all or some form of mining . . . .	819,876
Mining claims filed . . . . .	1,244
Actual acreage affected (each claim covering an average of 20 acres; overlapping claims are not calculated) . . . . .	24,880
23 Notices filed on 5 acres or less (assuming maximum) . . . . .	115
2 Plans of Operations (average 20 acres) . . . . .	40

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on this 18th day of August, 1981.

/s/ Frank A. Edwards  
FRANK EDWARDS

# Exhibits to the 1 C Edwards Affidavit

STATE: Bureau — 2021d1 — Open to all mineral entry

Action Number	Acres opened	Claims located after opening	Operating Under 43 CFR 1609 Notices	Plans	Date of opening order	Number of claims located by year									
						80	81	82	83	84	1	2	3	4	5
AK	0	0	0	0											
AZ	58,033	69	1	0											
CA	21,329	445	5	0											
CO	3,537	84	1	0											
ES	0	0	0	0											
ID	910	31	0	0											
MT	1,439	1	0	0		13	6								
NV	91,210	149	9	1											
NM	0	0	0	0				45	53	42	9				
OR	26,445	34	4	0			4								
UT	23,249	25	0	0				7	20	2					
WY	4,455	406	3	1				1	7	17					
Total	230,607	1,244	23	2		13	50	89	345	696	27	12	2	8	5

Claims are located for all forms of commodities under the mining laws.

STATE: California - Open to All Mineral Entry Under 202(d) of PLPMA

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3409 Plans	Date of opening order	Number of claims located by year					
					80	81	82	83	84	1984
III R	06057	120		01-25-81						
CA	2824WR	15	0	06-11-82				2	2	
CA	7024WR	139	0	07-29-81				2	2	
CA	7025WR	25	0	04-10-81				2	2	
CA	7756WR	38	0	09-01-81			3			
S	4207WR	20	0	01-21-81						
R	02354WR	110	0	03-07-84				3		
S	4885WR	20	0	09-15-81					6	
S	077035WR	70	0	08-30-80					1	
CA	7758WR	203	0	09-01-81	10		1	16	9	
S	2507WR	95	0	09-01-81			2	2		
CA	7105WR	5	0	09-02-81				4		
CA	7107WR	1	0	09-23-81						
CA	7114WR	1	0	10-26-81				1		
CA	7115WR	8	0	10-26-81				1		
CA	7118WR	5	0	11-16-81				2		
CA	7119WR	82	0	11-16-81				14	14	
CA	7120WR	10	0	11-16-81					3	
CA	7121WR	15	0	10-26-81				1		
CA	7123WR	3	0	10-26-81				2		
CA	7124WR	626	0	11-16-81				64		
CA	7131WR	13	0	01-31-83					1	
CA	7134WR	23	0	01-31-83					1	
CA	7137WR	95	0	12-31-82						
CA	7161WR	125	0	12-31-82						
CA	7164WR	5	0	01-11-83					1	
CA	7171WR	86	0	10-05-81						
CA	7218WR	21	0	10-26-81			1	26	11	

Claims are located for all forms of commodities under the mining laws.

Claims are located for all forms of commodities under the mining laws.

STATE: Arizona - Open to All Mineral Entry Under 202(d) of PLPMA

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3409 Plans	Date of opening order	Number of claims located by year					
					80	81	82	83	84	1984
III R										
CA		1	0	12-8-81					1	
CA		400	0	10-7-81				36	0	
CA		2	0	10-7-81					1	
CA		2	0	10-7-81					2	
CA		5	0	12-8-81				5		
CA		4	0	10-7-81			4			
CA		1,925	0	10-7-81						
CA		4,445	0	10-7-81						
CA		6,360	0	10-7-81						

## Number of claims lodged by year

Action Number	Area opened	Claims located after opening	Operating Under 43 CFR 3009 Notices	Under Plans	Date of opening order	Number of claims located by year													
						80	81	82	83	84	1	2	3	4	5				
111	C 081299	265	18	0	0	9-28-83													
	C 083416	105	7	0	0	9-28-83							15	3					
	C 083451	260				9-28-83					4		3						
	C 083452	544	13	0	0	9-28-83													
	C 083453	1,233				9-28-83							13						
	C 083472	1,000	38	0	0	9-28-83											26		
	C 8085	130	8	1	0	5-21-81											8		

Claims are treated for all forms of commodities under the mining law.

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[illegible]

## STATE: Idaho -- Open to All Mineral Entry Under 202(d) of FLPMA

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3809 Notices	Plans	Date of opening order	Number of claims located by year				
						80	81	82	83	84
III	1-1639	430	12	0	7/31/80	12				
	1-2448	240	6	0	5/27/81		6			
	1-2834	240	13	0	11/14/80	1			12	

Claims are located for all forms of commodities under the mining laws.

## STATE: Montana -- Open to All Mineral Entry Under 202(d) of FLPMA

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3809 Notices	Plans	Date of opening order	Number of claims located by year				
						80	81	82	83	84
III	M 1361	1,439	1	0	7/9/82					1

Claims are located for all forms of commodities under the mining laws.

## STATE: Oregon - Open to All Mineral Entry Under 202(d) of FLPMA

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3409 Plans	Date of opening order	Number of claims located by year				
					1985	1986	1987	1988	1989
III	OR 6409A	25,075	18	4	0	8/6/82	15	2	
	OR 13499	1,258	5	0	0	2/3/82	5		
	OR 14746	40	7	0	0	4/15/82			
	OR 6113	72	4	0	0	6/17/81	4		
13,499 [cc]									

Claims are located for all forms of commodities under the mining laws.

## STATE: Nevada - Open to All Mineral Entry Under 202(d) of FLPMA

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3409 Plans	Date of opening order	Number of claims located by year				
					1985	1986	1987	1988	1989
III	257	1	0	0	10/31/83				
	257B	4	0	0	10/31/83	7			
	1575	2	0	0	10/31/83				
	1025	12	1	0	12/22/82	12			
	1574	7	0	0	01/03/83	7			
	049608	39	0	1	02/05/82	5	34		
	049787	144	1	0	02/17/82	1			
	049778	80	9	1	10/29/81	4			
	049805	14,413	3	0	11/30/81	2			
	049794	15,794	17	4	10/29/81	6			
	043486	40	3	0	10/14/81	3			
	070	480	2	0	04/17/81	2			
	3557	40	12	0	06/05/82	12			
	2962	118	3	0	08/27/81	3			
	0699	669	12	0	12/21/81	12			
	8575	275	1	1	08/20/81	1			
	3007	946	20	1	08/20/81	20			
	15767	80	1	0	11/30/81	1			

Claims are located for all forms of commodities under the mining laws.

STATE: Utah - Open to All Mineral Entry Under 202(d) of FLPMA

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 1609 Notices	Plans	Date of opening order	Number of claims located by year				
						80	81	82	83	1984
111	1 - 2923	1,061	6	0	5 3 82					
	1 - 4913	8,987	3	0	6 30 82					
	1 - 8150	286	2	0	12 31 81				1	
	1 - 7041	2,723	2	0	2 16 82				2	
	1 - 8151	1,200	1	0	5 15 82					1
	1 - 12307	8,916	11	0	1 4 83			1		10
										6

Claims are located for all forms of commodities under the mining laws.

STATE: Wyoming - Open to All Mineral Entry Under 202(d) of FLPMA

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 1609 Notices	Plans	Date of opening order	Number of claims located by year				
						80	81	82	83	1984
111	W 6228	4,455	406	3	1	4 30 84				
									2	404

Claims are located for all forms of commodities under the mining laws.

IN THE UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS

DECLARATION OF G. WILLIAM LAMB

I, G. William Lamb District Manager of the Bureau of Land Management's Arizona Strip District, declare under penalty of perjury that the following is true and correct to the best of my knowledge and belief. -

There have been several withdrawals and classifications placed on the public lands in Arizona north of the Colorado River known as the Arizona Strip[sic].

In 1930 Executive Order 5339 withdrew a large area along the Colorado River including a portion of the Shivwits Plateau (see attached map for detail). The withdrawal segregated the land from all forms of land disposal but was left open for metalliferous mineral exploration which included uranium, copper and other hard rock minerals. In 1948 a portion of that withdrawal located on the Shivwits Plateau was revoked. In 1964 Lake Mead National Recreation Area was established, and in 1975 the Grand Canyon was enlarged, these two Congressional land actions covered the major portion of the 1930 withdrawal and provided greater protection from mineral exploration than the original withdrawal. The remaining portion of the 1930 withdrawal was revoked in 1981 and 1982. There

is, however, over 100 sections of land within the original 1930 withdrawal on the Shivwits and Sanup Plateaus that are privately owned minerals that were not subject to the withdrawal segregations.

Departmental Orders between the years of 1953 and 1963 withdrew approximately 65,000 acres for water storage projects on the Colorado River below Glen Canyon. This action withdrew the land from all forms of appropriation under the public land laws, but in 1954 they were opened to mining location, entry and patents. With designation of the Paria Canyon Primitive Area in 1969 and establishment of the Glen Canyon National Recreation Area (NRA) in 1972, approximately 23,000 acres were returned back under the operation of the public land laws in 1981. The remaining acres were retained for Glen Canyon NRA and the Paria Primitive area. In 1984 approximately one half of the 23,000 acres that was lifted was included within the Paria Canyon-Vermilion Cliffs Wilderness Area. Approximately 42,000 acres of the original withdrawal continues to be protected under those withdrawals. Of these 42,000 acres approximately 30,000 acres are found within the Glen Canyon NRA, the Grand Canyon National Park, or the Paria Canyon-Vermilion Cliffs Wilderness Area. This provides double coverage from all form of land appropriation, but leaves the area open for water impoundment and storage along the Colorado River and its tributaries.

Between 1967 and 1970 approximately 2,566,000 acres of public land on the Arizona Strip was classified for multiple use management under the Multiple Use and Classification Act of 1964. This segregated the land from sale, agricultural and exchange laws except for 8,219 acres that was further segregated from the mining laws (see attached map for location of the 8,219 acres). Since these

classifications were determined to be unnecessary after the passage of FLPMA they were terminated in 1981. However, approximately 3,300 acres of the 8,219 acres which were segregated from the mining laws are still included in the Virgin River Gorge scenic withdrawal or the newly designated wilderness areas which continue to segregate these areas from all form of appropriation.

The majority of the land in the Arizona Strip has always been open to metalliferous exploration and development including uranium mining. While the actions taken since 1981 did open some of these lands to the mining laws, this is likely to have little effect on the uses of these lands because in our opinion they do not contain any nonmetalliferous mineral that can be economically mined.

/s/ G. William Lamb  
G. WILLIAM LAMB

[handwritten]  
9-4-86

IN THE UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS

DECLARATION OF JACK KELLY

I, Jack Kelly, under penalty of perjury state:

1. I am presently employed as the Lander, Wyoming Resource Area Manager, Bureau of Land Management (BLM), U.S. Department of the Interior, Lander, Wyoming.

2. I have served in my present position with the BLM since September 1983. Prior to that, I served as Assistant District Manager, Lands and Renewable Resources, for the Rawlins, Wyoming District of the BLM, from November 1978 to August 1983. On occasion during that period, I served as acting District Manager, Rawlins District. To date, I have been employed by the BLM over a period of fifteen (15) years.

3. My current job responsibilities include overall management and supervision over BLM's land management activities in the Lander Resource Area, which comprises in excess of 2.5 million acres of public domain lands situated in west-central Wyoming. Included within this large area is an area comprising approximately 1.2 million acres known as the Green Mountain area.

4. The Green Mountain area is basically composed of three relatively discrete areas. The Green Mountain-Crooks Mountain area is located in the southern portion of the overall area, and is situated approximately 60 miles east-southeast of Lander and immediately to the southwest and southeast of Jeffrey City, Wyoming. The predominate features of the area are Green Mountain and Crooks Mountain, each of which rises in excess of 2,000 feet above the surrounding plains and is characterized by steep slopes and dense lodgepole pine forests interspersed with meadows near the upper portion of the mountains. The Green Mountain-Crooks Mountain area is noteworthy primarily for its timber resources, deer and elk herds, recreation, and its valuable deposits of uranium.

5. The South Pass Area is located approximately 24 miles due south of Lander and is situated at the south end of the Wind River Mountain range. It is an important recreation area, and people come there to fish, hunt, camp, or partake of the rich historical and cultural heritage that exists by virtue of the South Pass Mining District, an active gold mining area that has been actively mined, commercially or recreationally, from the mid-19th century to the present.

6. The third general part of this area encompasses a vast amount of lands lying basically between the Green Mountain-Crooks Mountain Area and the South Pass Area, together with substantial amount of land lying to the south and north. This "third area" is significant for its rangeland, its fisheries, its wildlife habitat, for recreation, and for its important cultural resources, and for its leasible and locatable mineral resources.

7. Because of the rich ecological diversity of this area and because of its economic, environmental, recreational, and historical importance to the public, this area has been

carefully managed by BLM for many years. Of crucial significance to BLM's management efforts has been the development of comprehensive land use plans for the area.

8. Prior to 1977, the Green Mountain and South Pass areas were covered with the following land use plans:

- a. West Lander MFP
- b. Grainte Mountain MFP
- c. "Below the Rim" MFP
- d. Seven Lakes MFP

These were prepared and completed between 1969 and 1976.

9. In 1977, partly in anticipation of the need to prepare an environmental impact statement (EIS) on grazing and range management for the area, BLM began the process of preparing a new land use plan encompassing all of the Green Mountain area. This plan denominated a Management Framework Plan (MFP) in accordance with BLM's then applicable Manual, was to be prepared by personnel in the Lander Resource Area in cooperation with the Rawlins District Office and, to a lesser extent, with personnel from the Wyoming State office.

10. The initial steps in this planning effort consisted of the preparation of a Unit Resource Analyses (URA) for the entire area and the initiation of public involvement and participation efforts by BLM.

11. The Unit Resource Analyses for the MFP (named the Sweetwater and South-Moneta MFP or commonly called Green Mountain MFP) was prepared during 1977 and 1978. This MFP will hereinafter be referred to as the Green Mountain MFP. It consisted of the following steps:

- (a) URA Step 1 involved the preparation of a base map for the planning area. The base map indicated the boundaries of the planning unit, the areas ultimately to be covered by the Green Mountain

Grazing EIS, and land status (*i.e.*, ownership, withdrawals, etc.) of the lands within the planning unit.

(b) URA Step 2 involved a detailed description of the basic geographic and environmental characteristics of the overall area. This included information concerning climate, topography, vegetation, water resources, animals (wild and domestic), fire dangers, any physical factors that would limit management opportunities and the kinds and amounts of resource development in the area.

(c) URA Step 3 involved the preparation of a description of the present management situation: *i.e.*, the status of wild/horse and range management, forestry, wildlife habitat, recreation, lands, and minerals.

(d) URA Step 4 involved a detailed analysis of the potential uses and opportunities for management with respect to each of the various resources in the area managed by BLM.

(e) The URA also included the preparation of an ecological profile of the area. Its purpose was to ascertain and describe any unique or fragile areas within the planning unit, including any areas of Critical Environmental Concern, to define the predominate land uses within the area, and to identify all important management consideration [*sic*] that would need to be taken into account in order to develop a land use plan sensitive to preserving and enhancing areas of ecological impacts.

In carrying out the URA process for the Green Mountain MFP, BLM followed the BLM Manual requirements set forth in BLM Manual Part 1605. Included within that process was an identification of the existence of any lands

segregated or withdrawn from multiple use management, including segregation from the application of the mining laws. (BLM Manual, § 1605 \_\_\_\_\_).

12. A true, genuine, and correct copy of the URA for the Green Mountain MFP, which was completed in 1978, is attached hereto and incorporated herein by reference as Exhibit 1.

13. During the period in which the URA was being prepared, BLM also initiated its public participation program for the Green Mountain MFP as well as the Green Mountain Grazing EIS. During 1977-1978, BLM engaged in approximately 80 individual contacts with the public regarding upcoming planning and EIS work for the area. These contacts consisted of telephone calls, personal interviews and discussions, receipt of correspondence from members of the public, group meetings and workshops. Each such contact was documented on a Form 1600-16. True, genuine and correct copies of the forms 1600-16 covering the period October 1976 to October 1978 are attached hereto and incorporated herein by reference as exhibits 2 and 3.

14. Throughout this same period, BLM was also conducting a number of other efforts to generate data and information to be used in the MFP and the Grazing EIS. Between 1976 and 1979 BLM conducted a stage II U.S. Forest Service intensive forest inventory to determine the volume/acre by timber type for use in managing commercial timber operations on the Lander Resource Area. During the same period, BLM conducted a vegetative survey for the Green Mountain area in order to collect information on plant composition and use by livestock. This information would later be used to determine carrying capacities and proper use levels by livestock (and wild horses) for each grazing allotment area. BLM conducted

wildlife inventories throughout the period and also obtained wildlife and fisheries data from the Wyoming Game and Fish Commission. Also, other data collecting efforts, such as minerals and soils inventories, were being conducted.

15. In 1978 and early 1979, BLM completed the MFP Step I process. This consisted of the development of objectives and recommendations by a team of resource specialists for the management of each resource within the area. The objectives and recommendations developed at this stage of the planning process were oriented towards managing the land so as to maximize the potential for each resource independently of every other resource in the area (*i.e.*, a "Blinders On" approach). Under this approach, for example, the wildlife specialist developed objectives and made planning recommendations oriented solely to the maximum enhancement of the area for wildlife habitat. The mineral and range management specialists did likewise for their respective resources. The purpose of this approach was to develop a set of proposals reflecting the optimum management possibilities for each resource. If, later in the planning process (*i.e.*, MFP Step II) conflicts with other resource objectives surfaced, the decisionmaker through this process would be assured of having before him a full range of management options for each resource. Similarly, if no such conflicts were to develop, this approach ensures that "non-conflict" resources could be managed at their optimum level.

16. During the summer of 1979, BLM developed draft MFP Step II recommendations. MFP Step II consisted of a multiple-use analysis of all of the objectives and recommendations developed by the resource specialists in Step I. This included an analysis of all of the potential social, economic, institutional, and environmental values in-

involved in or affected by the Step I recommendations, together with some tentative [*sic*] recommendations with respect to how conflicts in Step I objectives and recommendations might be resolved.

17. During the period when MFP Steps I and II were undertaken, BLM continued involving the public in its planning process. True, genuine and correct copies of its Forms 1600-16 reflecting the public involvement activities of BLM from October 1978 through October 1979 are attached hereto and incorporated herein by reference as Exhibit 4. Among the activities undertaken were meetings with the Green Mountain Monitoring Group (3/26/79), and meetings and contacts with ranchers, the Wyoming State Oil and Gas supervisor (7/26/79), the Forest Service, and many others. In addition, on July 30, 1979, BLM sent a letter to all interested individuals enclosing a discussion and brief explanation of the draft MFP-Step II proposals and announcing that an open house would be held on August 21 and 22, 1979, and that a public meeting would be held on the evening of August 22, 1979, to receive the public comments on the draft MFP Step II proposals. A copy of the July 30, 1979, letter and enclosure is included within Exhibit 4, *supra*. A true, genuine and correct copy of the mailing list reflecting the persons or individuals to whom this letter was sent is attached as Exhibit 5.

18. On August 21 and 22, 1979, an open house on the draft MFP Step II proposals was conducted at the Lander Resource Area Office.

19. On the evening of August 22, 1979, a formal public hearing was held at the Lander Valley High School Auditorium. The purpose of the public hearing was to explain to the public BLM's land use planning process and to provide the public with an opportunity to comment on the draft MFP-Step II proposals. The proposed review of the

areas segregated from mining location pursuant to classification W-6228 were specifically discussed by the Lander Resources Manager (see Transcript, at 9). The hearing was also devoted to obtaining public input relative to identifying important issues to be addressed in the Green Mountain grazing EIS. A true, genuine and correct copy of the Transcript of the August 22, 1979 public hearing is attached hereto and incorporated herein as Exhibit 6. In addition, a true, genuine, and correct copy of the record of the public open houses on August 21 and 22, 1979, is attached hereto and incorporated herein as Exhibit 7.\*

20. Following the Public Hearing, BLM continued work on the Green Mountain MFP. By November of 1981, BLM had completed the process of reaching proposed MFP Step III multiple use decisions based on the Step II recommendations and multiple use analysis and on the input received from the public. On Wednesday, September 30, 1981, BLM published a notice in the Federal Register indicating that BLM would in fact be preparing a grazing EIS for Green Mountain based on range management planning recommendations developed pursuant to the MFP process. The Notice also announced a public scoping meeting to be held on November 2, 1981. The purpose of the meeting was:

- (1) to provide the public with an opportunity to comment on [the] proposed management framework plan decisions not directly related to rangeland management; (2) to present rangeland management multiple use planning recommendations to the public; (3) to inform the public of the proposed action and tentative

\* Written comments received relative to BLM's MFP Step II proposals are including within Exhibit 4.

alternatives that BLM proposes to analyze in the EIS; (4) to gather resource information from the public; and (5) to identify concerns and issues important to the public for possible inclusion into the EIS or into planning system decisions. Comments received at this scoping meeting will be used in developing the EIS and the planning decisions that result.

46 Fed. Reg. 47873.

A true, genuine and correct copy of the above-referenced Federal Register Notice is attached hereto and incorporated herein by reference as Exhibit 8.

21. On November 2, 1981, the above-indicated public hearing was held at the Fremont County Library in Lander, Wyoming. The proposal to review lands segregated from mineral entry were [sic] once again discussed by the Lander Resources Manager at the hearing. (See Transcript, at 9). A true, genuine and correct copy of the transcript of the public hearing is attached hereto and incorporated herein by reference as Exhibit 9. A true, genuine and correct copy of the attendance list at the hearing is attached hereto and incorporated herein by reference as Exhibit 10.

22. On December 2, 1981, 30 days subsequent to the November 2, 1981 public hearing, the Green Mountain MFP Step III decisions not directly relating to rangeland management became final.

23. Throughout the above-described MFP process, attention was given to whether a number of then existing segregations from the general mining laws, 30 U.S.C. § 21 *et seq.*, should be continued. The most significant of these segregations was imposed as a result of a then-existing Multiple Use classification dating back to 1967 (as amended in 1970).

24. On November 22, 1967, approximately 2,077,702 acres of public lands in the general Green Mountain-South Pass area in Fremont and Natrona Counties in Wyoming were classified for multiple use management pursuant to the Classification and Multiple Use Act of 1964, 43 U.S.C. § 1411. All of this land was thereby segregated from appropriation under the agricultural land laws and from sales pursuant to Section 2455 of the Revised Statutes (43 U.S.C. § 1171). In addition, approximately 4,128 acres within this area was further segregated from appropriation under the general mining laws, 30 U.S.C. § 21. (See 32 Fed. Reg. 16057, with reference to Multiple Use Classification W-6228).

25. On December 1, 1970, this classification was amended in order to segregate an additional 2,251 acres in Fremont County, Wyoming, from the operation of the general mining laws. (See 35 Fed. Reg. 18682-83, December 9, 1970).

26. True, genuine, and correct copies of both of the above classification notices are included within the certified copy of the complete multiple use management classification File W-6228 (W-6228 File) attached hereto and incorporated herein by reference as Exhibit 11.

27. Of the total 6,373 acre area segregated from operation of the general mining laws, 1,825.93 acres were in the Green Mountain-Crooks Mountain area; 3,773 acres were in the South Pass area, and an additional 610 acres were scattered throughout the Lander Resource area on four sites: Castle Gardens (80 acres); Lost Cabin (320 acres); Beaver Rim (170 acres); and Hall Creek (40 acres). The location of these scattered tracts are more particularly described in the Environmental Assessment land report on the C&MU classification Review of W-6228, included within the W-6228 file. The Lost Cabin tract (320 acres)

and the Castle Garden Tract (80 acres) were not encompassed within the Green Mountain MFP.

28. Throughout the URA, Planning Area Analysis (PAA), and MFP processes, consideration was given to the need to review the mineral entry segregations in the Green Mountain and South Pass areas created by W-6228 in order to determine whether their retention was still necessary or appropriate. In the Minerals Section of the MFP, for example, the MFP Step I Objective was stated as being to open to mineral location approximately 9,800 acres in the South Pass Mining District then segregated from mineral location, (Sweetwater MFP M-7).<sup>\*</sup> In keeping with that objective, the MFP Step I recommendation was that the mineral entry segregation for the South Pass area established by W-6228 be revoked by 1984. (Recommendation M-7.1).<sup>\*\*</sup>

29. Similarly, in the uranium portion of the minerals section there was an MFP Step I recommendation that the mineral segregation established by W-6228 be revoked on Green Mountain because of the existence of valuable and important uranium deposits located in this area. (Recommendation M-5.3).

30. During the MPF-Step II Multiple Use Analysis, several conflicts with other resource programs were identified. With respect to the South Pass area, it was noted that the original segregations were made to protect the areas for recreational use. It was further noted that most

<sup>\*</sup> This 9,800 acres included lands in four old mining districts—South Pass, Miners Delight, Atlantic City, and Lewiston. Approximately 3,800 of these acres were segregated from mineral entry by virtue of Classification W-6228.

<sup>\*\*</sup> The rationale for this recommendation was the possible existence of a multi-million dollar gold deposit within the South Pass District, the rising value of gold, and the then existing U.S. gold deficit.

of the segregated sites were located within the South Pass Historic District, and classed as "Class 2" visual area, and that new mineral exploration or development could interfere with the areas' value for this purpose. The Step II analysis also noted potential adverse affects [sic] on important historic or cultural sites, with forestry management, and with the maintenance of important fish and wildlife habitat.

31. As a result of the Step II Multiple Use Analysis, the Step I recommendation was modified to call for a careful site-by-site multiple use evaluation in accordance with FLPMA to determine—for each site—whether the existing segregation should be retained, modified, or eliminated. (Multiple Use Analysis and Recommendation, M-7.1).

32. A similar Multiple Use Analysis was undertaken with respect to the segregations in the Green Mountain area. After noting potential conflict with existing campgrounds, important visual or scenic resources and important fish and wildlife habitat, the Step I recommendation to eliminate the segregation in total was modified to provide for a site-by-site multiple resource evaluation to determine whether the segregation should be retained, modified, or revoked. (Multiple Use Analysis and Recommendation, M-5.3).

33. The above-referenced Step I Recommendations and Step II Multiple Use Analysis and Recommendations (in draft form) were made available to the public at the August 21-22, 1979 open houses and at the August 22, 1979 public hearing. In addition, the Step I Recommendations, the final Step II Multiple Use Analysis and Recommendations, and BLM's proposed Step III decisions were presented to the public for review in connection with the November 2, 1981 public hearing on the Green Mountain MFP.

34. Following the completion of the MFP, BLM undertook the site-by-site multiple use analysis of these mineral segregations pursuant to the decisions reached through the MFP process. On September 23, 1982, that review was completed. On that date, BLM issued its Decision Record, which consisted of an Environmental Assessment/Land Report Wy031-2-1776, mineral reports, maps, and other attachments. BLM's final decision was to terminate the mineral segregation on approximately 5,120 acres of the 6,379 acres originally segregated by W-6228. By area, the segregation was to be retained on approximately 959 acres in the South Pass area in order to protect wildlife values (Environmental Assessment, Part II Recommendation and Rationale); retained on approximately 120 acres in the Green Mountain area in order to protect significant recreation sites (Environmental Assessment, Part I Recommendation and Rationale); and retained on approximately 180 acres in the Castle Gardens (80) and Beaver Rim (100) areas in order to protect respectively an important archeological site and a proposed "Area of Critical Environmental Concern." (Environmental Assessment, Part III Recommendations and Rationales).

35. BLM made four separate consistency determinations with regard to the foregoing review. First, in its Categorical Exclusion Decision Record with regard to the termination of Classification W-6228 (exclusive of the mineral segregations), BLM concluded that termination was consistent with the Sweetwater-Moneta MFP (Attachment "D", Environmental Assessment/Land Report). Second, with regard to the mineral segregations on Green Mountain and in the South Pass area, BLM made separate determinations that each modification was consistent with the Sweetwater (or Green Mountain) MFP, Sections M-5.3 and 7.1, respectively. (Decision Factors, Parts I and II, Environmental Assessment/Land Report). Finally, with

regard to the scattered tracts, BLM determined that the proposed modifications with regard to the Beaver Rim Area were consistent with Moneta (Green Mountain) MFP Sections M-4.1, F-2, and WL-9-1.1. While no such specific finding was made, with respect to [sic] the Hall Creek area, it is my judgment that termination of the mineral segregation with respect to it (40 acres) was also consistent with the Green Mountain MFP. The other two scattered tracts—Castle Gardens (80 acres) and Lost Cabin (320 acres) were located within the “Below the Rim” MFP Planning Unit. As noted above, the decision was made to retain the Castle Gardens mineral segregation in its entirety. With respect to the Lost Cabin mineral segregation, while no specific consistency determination with the Below the Rim MFP was made, the Environmental Assessment/Land Report demonstrates the lack of any continuing justification for this isolated segregation and its termination was not in my judgment, inconsistent in any respect with the “Below the Rim” MFP.\*

36. Subsequent to the issuance of BLM’s Decision Record and Environmental Assessment/Land Report, the Wyoming State Game and Fish Department raised some additional concerns regarding the impacts that terminating mineral segregations in the South Pass area might have on critical winter moose habitat. In addition, individuals interested in mining opportunities in the South Pass area

\* The “Below the Rim” MFP was completed in 1972. It was reaffirmed and determined to be in compliance with FLPMA’s land use planning requirements in March of 1980 pursuant to 43 C.F.R. § 1601.8 (1/79). In that connection, it was determined that the “Below the Rim” MFP fully complied with FLPMA’s principles of multiple use and sustained yield management, and was prepared and developed with sufficient opportunities for public participation and with sufficient intergovernmental coordination with state, county, and local agencies.

raised concerns regarding the retention of some segregations. Between September of 1982 and March of 1984, BLM reviewed its September 23, 1982 Decision in light of these concerns.

37. As a result of that review, BLM determined that the segregation on an additional 768.47 acres in the South Pass area be retained in order to protect high value wildlife habitat. (March 26, 1984 Memorandum from Rawlins, District Manager to the State Director, which is included within the W-6228 File).

38. As a result of the above change, BLM’s final determination was [sic] to terminate W-6228’s mineral segregation with respect to 4,455.06 acres, and to retain the segregation on 1,913.47 acres. This final determination was announced in the Federal Register on May 10, 1984 (49 Fed. Reg. 19904-05, a copy of which is included within W-6228 File).

39. In December of 1982, the Green Mountain Final Grazing EIS, which was prepared in conjunction with the 1981 Sweetwater-Moneta MFP, was issued in final form.

40. Finally, it should be noted that BLM has undertaken additional planning activities in the Green Mountain-South Pass area, and that those activities have included a further evaluation of whether—in whole or in part—lands within the area should be segregated from mineral entry.

41. In January of 1984, BLM announced that it was initiating a Resource Management Plan for the Lander Resource area. (49 Fed. Reg. 3278 [January 26, 1984] a true, genuine and correct copy of which is attached hereto and incorporated herein as Exhibit 12). In connection with this process, open house—public meetings were held in Lander, Jeffrey City, Atlantic City, and Dubois on November 5-8, 1984, in order to collect data, to receive

input from the public, and to explain the RMP process to the public.

42. In November of 1985, the Draft Lander Resource Area RMP/Environmental Impact Statement was published. Among the alternatives considered with respect to the South Pass area were ones addressing whether the entire South Pass area should remain open to mining (excepting the areas kept segregated pursuant to the 1984 W-6228 decision); whether the entire area previously segregated should be withdrawn from mineral entry; whether the entire area should be opened to mining, but under circumstances where approved plans of operation would be required for all mining activities; and whether the present situation, including the segregations retained by the 1984 W-6228 Decision, should be maintained, except that all future mining activities in the area would require approved plans of operation (the preferred alternative).

43. Almost the same array of alternatives was provided with respect to the Green Mountain area, except that the draft failed to consider as an alternative whether the areas previously segregated from mining by W-6228 should now formally be withdrawn. This alternative will, however, be included in the Final RMP/EIS as a result of comments from, among others, the plaintiff in the above-captioned litigation.

44. On December 11 and 12, 1985, public hearings were held on the draft RMP/EIS in Dubois and Lander, respectively. The hearings were announced in the Federal Register on November 5, 1985 (50 Fed. Reg. 45943, a true, genuine and correct copy of which is attached hereto and incorporated herein by reference as Exhibit 13).

45. On November 7, 1985, BLM also announced its intention to prepare a Wilderness Study Supplement to the RMP/EIS, the scoping meetings for which were held in

conjunction with the above noted public hearings on the draft (50 Fed. Reg. 46361, a true, genuine and correct copy of which is attached hereto and incorporated herein by reference as Exhibit 14).

46. On February 18, 1986, BLM received written comments on the Draft RMP/EIS from the National Wildlife Federation.

47. On February 14, 1986, the 90 day comment period on the Draft RMP/EIS ended. A true, genuine, and correct copy of the Draft RMP/EIS is attached hereto and incorporated herein by reference as Exhibit 15.

48. On or about October 30, 1986, the Final RMP/EIS on the Lander Resource Area, which includes the area covered by W-6228, will be distributed to the public.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Dated this 4th day of September, 1986.

/s/ JACK KELLY  
Jack Kelly

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF

v.

ROBERT F. BURFORD, DONALD P. HODEL, AND THE UNITED  
STATES DEPARTMENT OF THE INTERIOR, DEFENDANT

DECLARATION NO. 2 OF VINCENT J. HECKER

I. INTRODUCTION

1. I, Vincent J. Hecker, Chief, Division of Lands, of the Bureau of Land Management (BLM), United States Department of the Interior, hereby declare under penalty of perjury that the information contained in this declaration is true and accurate to the best of my knowledge. Some of the details in this declaration have been supplied by my subordinates or other sources within BLM.

2. A withdrawal is the means by which a specified tract of land is removed, *i.e.*, segregated, from the application or operation of one or more of the public land laws. See James Parker Affidavit at ¶ 5. During the early 1900s, the vast majority of the public lands of the United States were open to appropriation under a variety of laws, *e.g.*, the Homestead Act, the Mining Law of 1872, the Isolated Tract Act, and the Small Tract Act. Withdrawals were used to remove the lands from the operation of these laws and, generally, to reserve the lands for specific uses, *e.g.*, a military base. Federal agencies could also request

that lands be withdrawn on their behalf for specific agency purposes, *e.g.*, lands were withdrawn for the Bureau of Reclamation for use in dam construction or agricultural development or by the military departments for various defense needs.

3. Although withdrawals were made as early as the Nineteenth Century by the President, the first congressional authority for Presidential withdrawals was enacted in 1910, 36 Stat. 847 (Pickett Act). This act specified that withdrawals were "temporary" in nature, and that the segregative effect of a withdrawal would continue until the withdrawal was modified, revoked or vacated. By the mid 1950's faced with a large number of withdrawals, covering millions of acres of the public lands, Interior concluded that some form of withdrawal review was necessary. Many withdrawals were outdated, proposed projects abandoned, land character changed and/or the best utilization of the lands lay in some other land management function. In addition, numerous agencies on whose behalf a withdrawal had been made either no longer had a need for it or in a few instances, the agency itself had ceased to exist.

4. The early objectives of withdrawal review were:

- (a) To reduce withdrawals to the minimum level consistent with program purposes;
- (b) To maximize public and private use of withdrawn lands consistent with the purpose of the withdrawals; and
- (c) To eliminate all unnecessary withdrawals.

See Exhibit 2 to Edwards' Affidavit 1B and accompanying texts. Efforts were also made to coordinate withdrawal review with general land use planning activities. See *id.*

5. With the enactment of the Federal Land Policy Management Act in 1976 (FLPMA), the Secretary of the Interior (Secretary) received general authority to "make,

modify, extend or revoke" withdrawals under Section 204(a). This general authority has been used to revoke withdrawals since the passage of FLPMA. For a detailed discussion of the procedures relied on to revoke withdrawals, see Edwards Affidavit 1A at ¶ 5- ¶ 11; Parker Affidavit ¶ 19-¶ 23 and accompanying exhibits.

6. In 1980, the Solicitor's office issued an opinion which concluded that the withdrawal review and termination provisions of section 204(l) were self-contained. It further stated that withdrawals could be revoked, if necessary, under the authority of section 204(a) of FLPMA in order to complete ongoing projects, *e.g.*, exchanges, sales, State in-lieu selections and relinquishments in the "ordinary course of business." Thus, individual proposed revocation actions arising in the ordinary course of business, including withdrawals relinquished by other Federal agencies as no longer needed, could be completed under section 204(a). Moreover, section 204(l), by its own terms was limited both geographically and to certain types of withdrawals. Even though BLM was undertaking to move forward with withdrawal revocations in the 1970s, it was still criticized by the General Accounting Office in 1982 for not giving priority to reviewing and terminating withdrawals which segregated the land from mineral entry and development. See exhibit 23 to Edwards' affidavit 1B.

7. Withdrawals which were revoked in the ordinary course of business were grouped into two broad categories:

A. *Withdrawal relinquishments.* A withdrawal is relinquished when the Department or agency (holding agency) on whose behalf the withdrawal was made files a notice of intent to relinquish the withdrawal along with supplying Interior with supporting documentation showing the land is no longer needed

for the purpose for which it was originally withdrawn. Prior to FLPMA's passage, a number of withdrawals had been relinquished by holding agencies (some of which dated back to the 1940s and 1950s) but which had not been processed to completion. Such relinquishments were made by holding agencies pursuant to regulations at 43 C.F.R. 2370 which were developed prior to FLPMA. Only after the revocation by the Secretary became effected [*sic*], were the lands "public lands" subject to BLM's administration. See ¶ 21 of Parker Affidavit for more detail on withdrawal relinquishment procedures. Hereinafter, withdrawal revocations following relinquishments by other Federal agencies are referred to as Category A revocations.

B. *Pending Land Actions.* On many occasions in the past, withdrawals were used to prevent alienation of the Government's title under certain discretionary public land laws, *e.g.*, exchange, State selection and sale laws. If the BLM received a request to sell or exchange or open the land to multiple use, the withdrawal prohibiting such a proposal, along with its segregative effect, had to be revoked or modified to permit implementation of the proposed action. However, prior to allowing the sale or exchange or specific use to proceed, appropriate NEPA compliance and public comment was obtained on the proposed action. Hereinafter, withdrawal revocations made to allow a subsequent proposed action to proceed are referred to as Category B revocations.

8. *Record Clearing.* A third basis for revoking withdrawals was simply for record clearing purposes. Record clearing falls into three general categories. First, over the years, public lands covered by withdrawals were

transferred from Federal ownership by various means including Reclamation homesteads. Yet, the withdrawals were never revoked. Second, some public lands were covered by one or more layered or overlapping, withdrawals which provided equal or greater protection and, thus, to revoke one had no effect on the land. Third, withdrawn lands were protected by congressional action, e.g., the withdrawals had been superseded through the creation of national recreation areas, monuments, or parks. However, as the withdrawals in these three categories were never revoked, the land records indicated that BLM or some other Federal agency retained jurisdiction over the lands and hence was responsible for their management in accordance with FLPMA's objectives of multiple use and sustained yield. In order to reconcile the public land records with the current status of the land, withdrawals were deleted from the public records as a mere record clearing action. Hereinafter, withdrawals revoked for purposes of record clearing are referred to as Category C revocations.

9. The Bureau also revoked some withdrawals on its own initiative. Withdrawals revoked that fall within this category such as stock driveway withdrawals, are those that meet none of the three previously described categories and do not fall within any other legal prescription. These refer to withdrawals not covered by 204(f) either as to the type of withdrawal or as to the geographical location of the withdrawal. Hereinafter, withdrawals revoked on BLM's own initiative are referred to as Category D revocations.

10. Since January 1, 1981, the Secretary has issued 647 public land orders revoking or modifying a total of 18,991,920 acres. The general effect of the revocations was to restore the land to multiple use management pursuant

to Section 102(a)(7) of FLPMA. These totals fall within the four categories defined above as follows<sup>1</sup> :

- A. In category A, (withdrawals relinquished by other Federal agencies and revoked in the ordinary course of business), 194 withdrawals were revoked and/or modified covering 1,735,856 acres.
- B. In Category B, (withdrawals revoked to permit a proposed land action to proceed and thus revoked in the ordinary course of business), 72 withdrawals were revoked and/or modified covering a total of 90,651 acres.
- C. In Category C, (record clearing), 211 withdrawals were revoked and/or modified covering a total of 4,844,853 acres.
- D. In Category D, (BLM's own initiative), 170 withdrawals were revoked and/or modified covering a total of 12,320,560 acres. See exhibits 1-14.<sup>2</sup>

11. Due to the extensive number of withdrawals involved in revocation and modification actions since January 1, 1981, it is impossible to discuss with specificity each one. However, some random, representative examples follow with regard to each category.

<sup>1</sup> The PLO totals reflected herein have been calculated on the following basis: if they were revoked under the authority of more than one category, they have been counted only once and only in the category where the greatest amount of acreage appears.

<sup>2</sup> The figures in Exhibits 1-14 were derived from the Public Land Orders and supporting case files of the BLM. Every effort has been made to make them as correct as possible. However, we are continuing to review these statistics and, if necessary, we will file an errata sheet showing any corrections that are made in view of our ongoing review.

A. With regard to Category A revocations:

(1) PLO 5810 in Oregon had withdrawn 80 acres of lands for use by the Forest Service as a ranger station, within a national forest, which the Forest Service determined it was no longer needed and, thus, relinquished the withdrawal. The withdrawal was revoked on January 22, 1981. Also in Oregon, PLO 6412 revoked a withdrawal covering 238 acres that had been withdrawn on behalf of the Bureau of Reclamation in connection with the Rogue River Project which the Bureau of Reclamation had determined it no longer needed. This withdrawal was revoked on July 19, 1983.

(2) In Idaho, PLO 6568 revoked a withdrawal covering 120 acres on October 23, 1984, which had been withdrawn on behalf of the Bureau of Reclamation for the Southwest Idaho Water Management Study Area. The Bureau of Reclamation had determined that the area was no longer needed for its purposes.

(3) In the State of Florida, the Executive Order of October 29, 1900, had withdrawn 40 acres for use as a lighthouse by the military which was no longer needed. The withdrawal was relinquished, and subsequently revoked by PLO 6083 on November 19, 1981.

(4) In California, PLO 5931 restored 651 acres which had been withdrawn for the Department of Army for military training purposes. The revocation followed relinquishment by the Department of the Army, and became effective on May 29, 1981.

(5) In Arizona, PLO 5868 revoked a withdrawal involving 32,246 acres which had been

withdrawn on behalf of the Department of the Army in connection with the Yuma Test Station. Following the Department of the Army's determination that the withdrawal was no longer necessary, the withdrawal was relinquished by the Army and revoked by the Secretary on June 20, 1981.

(6) In the State of Nevada, a withdrawal had removed 640 acres from the operation of the public land laws for use by the National Park Service as an administrative site. Following relinquishment by the National Park Service, the withdrawal was revoked, and the lands restored to multiple use management on January 8, 1981, by PLO 5798.

(7) In the State of Utah, a withdrawal made on behalf of the Bureau of Reclamation in connection with the Bonneville Unit of the Central Utah Project was revoked on October 29, 1981, by PLO 6023 which restored 1,278 acres to multiple use management following relinquishment by the Bureau of Reclamation.

(8) In Colorado, 441 acres of public lands were withdrawn for the Bureau of Reclamation for the Collbran Project. Following a determination that the withdrawal was no longer needed, the withdrawal was relinquished by the Bureau of Reclamation and revoked by the Secretary on February 5, 1982, by PLO 6113.

(9) In New Mexico, PLO 5827 revoked a withdrawal covering 53,654 acres originally made on behalf of the Air Force for the operation of the Sacramento Peak Upper Air Research Site. Following relinquishment by the Air Force,

the Secretary revoked the withdrawal on January 23, 1981.

(10) In the State of Washington, the Coast Guard had withdrawn 11 acres for use as a light-house station. Following relinquishment by the Coast Guard, the withdrawal was revoked by the Secretary on February 5, 1982, by PLO 6120.

(11) Finally, in Montana, PLO 6205 revoked a withdrawal covering 287 acres which had been withdrawn on behalf of the Army for military purposes.

B. With regard to withdrawal revocations that fall within Category B:

(1) In Colorado, PLO 6102, revoked a 1944 powersite classification which lacked powersite values to "permit consummation of a pending exchange between the Forest Service and the Colorado State Board of Agriculture on 200 acres of land." The revocation became effective on February 5, 1982.

(2) In Utah, PLO 6599 revoked a withdrawal involving 40 acres as "the land has been identified for 'in lieu' State selection rights by the State of Utah." The revocation was effective on April 1, 1985.

(3) In Montana, PLO 6431 revoked a withdrawal covering 160 acres because such was "necessary to facilitate a Forest Service exchange." The revocation became effective on July 21, 1983.

(4) In the State of Washington, PLO 6447 revoked a withdrawal covering more than 6,500 acres, of which 1,319 acres "will be restored to State indemnity selection." It became effective on July 28, 1983.

(5) In Wyoming, PLO 6337 revoked a withdrawal covering 2.5 acres and "the subject land will not be restored to operation of public land laws since sale of the lands to private interest is planned." The revocation became effective on September 10, 1982.

(6) Finally, in Idaho, PLO 6426 revoked a withdrawal covering 320 acres to allow, in part, "consummation of the pending Forest Service land exchange with the State of Idaho."

The foregoing are examples of revocations falling within Category B that were completed in the ordinary course of business and permitted a then pending land transaction to be completed. The examples are not meant to be all inclusive. They constitute random, representative examples of the types of withdrawal revocations that are within Category B.

C. Category C, that is, record clearing, constitutes the largest category of revocations in terms of PLOs effected by the Secretary since January 1, 1981. One-third of all revocations are in this category.

(1) In the State of Idaho, PLO 6436 revoked a withdrawal involving 260 acres which "were conveyed out of Federal ownership without mineral reservation and will not be restored to surface entry, mining or mineral leasing. As such, this revocation is for record clearing only." It became effective July 25, 1983.

(2) In Oregon, PLO 6089 revoked a withdrawal covering 160 acres of land that had been withdrawn as a powersite reserve but had thereafter been transferred to private ownership. This revocation became effective on November 23, 1981. Also in Oregon, PLO 6512 revoked a Sec-

retarial order as to 2,998 acres of public lands that "have been conveyed out of Federal ownership and will not be restored to surface entry mining or mineral leasing." The revocation became effective on February 4, 1984.

(3) In California, PLO 6394 revoked four powersite reserves affecting 6,118 acres, all of which "remain withdrawn from disposition under the public land laws for the protection of the City of Los Angeles watershed by the Act of Congress dated March 4, 1931, or by Executive Order No. 6206 of July 16, 1933." This record clearing revocation was completed on June 28, 1983.

(4) In Wyoming, PLO 6397 revoked a withdrawal covering 25,402 acres and all but 600 were "subject to other overlapping withdrawals and, as such, will not be open to mining locations." The revocation became effective on June 28, 1983.

(5) In the State of Washington, PLO 6161 revoked a Secretarial order involving 158 acres but "the lands will not be restored to operation of the public land laws because they remain withdrawn for the Dungeness National Wildlife Refuge." The revocation became effective October 18, 1982. Also in Washington State, PLO 5815 revoked a withdrawal affecting 0.95 acres of land which, after the revocation, remain segregated from the public land laws and mining laws because of a "Recreation and Public Purposes Act classification WA 03675." The revocation became effective on January 22, 1981.

(6) In Montana, PLO 5854 revoked a withdrawal involving 120 acres which had previously

"been patented to the [Montana] State Fish and Game Commission." The revocation became effective on January 27, 1981.

(7) Finally, in Arizona, PLO 5976 revoked a withdrawal involving 1,199,267 acres of land in Arizona of which 1,009,610 acres had been conveyed into private ownership or were contained within other withdrawals. Thus, the land remained closed to all forms of appropriation following revocation. Revocation became effective on August 5, 1981.

The foregoing examples of revocations falling within Category C, that is, for mere record clearing, are not meant to be all inclusive. They are only random, representative examples of the type of revocations made solely for record clearing purposes.

D. Revocations that were undertaken by BLM on its own initiative are discussed below.

(1) In Arizona, five withdrawals were revoked. Executive Order 5339 withdrew 1,199,627 acres of land in Arizona in aid of legislation pending determination as to the advisability of including the lands in a national monument. Following congressional action creating the national monument, 189,657 acres remained outside of the Congressionally designated monument area. In light of the fact that this acreage was no longer needed, because Congress had acted, the withdrawal was revoked by PLO 5976. The lands had never been closed to metalliferous mining and mineral leasing. Of the remaining four withdrawals in this category that were revoked in Arizona, one (PLO 6156) covered land previously *not* closed to mining and/or mineral leasing.

The three remaining withdrawals that were revoked had only closed the lands involved to non-metalliferous mining; the lands had always been open to metalliferous mining and mineral leasing. Thus, none of the lands involved on these five withdrawals were restored to both all forms of mining or mineral leasing in Arizona as a result of the withdrawals revoked in this category.

(2) Of the ten revocations in the State of Utah which fall within this category, eight revoked withdrawals that had never closed the land to metalliferous mining or mineral leasing. The revocations opened the lands to nonmetalliferous mining only. The ninth revocation (PLO 6075) did not open the lands to any type of mining or mineral activity but only to sales and exchanges. Only one of the ten revocations in Utah (PLO 5849) restored the lands to both mining and mineral leasing and it involved only 160 acres.

(3) In Colorado, three revocations fall within this category. Two of them (PLOs 6164 and 6218) involve withdrawals which had never removed the land from the operation of mining and mineral leasing laws, while the third (PLO 6549) involved lands that had always been opened to mineral leasing and metalliferous mining. It only restored 40 acres of the land to non-metalliferous mining.

(4) In Nevada, seven revocations fall within this category. Of them, two (PLOs 6524 and 5899) involve lands that had never been closed to mining or mineral leasing. Two others (PLO 6108 and 6081) involved lands that had always remained open to metalliferous mining and mineral leasing and only restored the lands to

nonmetalliferous mining. A fifth (PLO 6472) involving 20 acres, restored lands to mining; the land had always been open to mineral leasing. The remaining two PLO's in Nevada in this category revoked withdrawals which "temporarily withdrew . . . lands considered valuable for oil shale" (PLO's 5917 and 6308). Of these two, one (PLO 6308) involved land that had always been open to metalliferous mining and oil and gas, sodium, and geothermal leasing. The other (PLO 5917) did not open the lands to mining or mineral leasing.

(5) In Montana, no revocations occurred which fall within this category.

(6) In the State of Washington, the eight revocations within this category did not open any new land to mining or mineral leasing activities. Five of the withdrawals that were revoked involved land that had never been closed to any mining or mineral leasing activities and three involved lands that had been closed only to non-metalliferous mining.

(7) In New Mexico, 15 revocations were made which fall either in whole or in part within into Category D. None restored lands to both all forms of mining or mineral leasing activity. Of the 14, eight restored lands only to nonmetalliferous mining, lands which had always been open to metalliferous mining and mineral leasing. The others involved lands that had always been open to both forms of mining and mineral leasing.

(8) In Wyoming, 14 revocations were made which fall within Category D. Four revocations (PLOs 6059, 6140, 6036 and 5862) involved lands

that had never been closed to mining or mineral leasing and thus did not open the lands to any new mining or mineral leasing activities. Five PLOs (6043, 6053, 5950, 6377, and 6455) involved lands that had always been open to metalliferous mining and mineral leasing. The PLOs reopened the lands to nonmetalliferous mining. Two of the PLOs (6114 and 6220) involved lands always open to mineral leasing but restored lands to mining. Three revocations (PLO 6123, 6186, and 6157) did reopen lands to mining and mineral leasing. However, out of the total of 96,963 withdrawn acres revoked in this category in Wyoming, the three revocations which reopened lands to mining and mineral leasing comprised only 396 acres.

(9) In California, 21 revocations were effected within this category. Of them, four PLOs (6432, 6376, 6358 and 6153) involved lands that had never been closed to mineral leasing or mining activities. Four revocations (PLO 6336, 6058, 6015 and 5830) involved lands that had always been open to mineral leasing activities, but were reopened to mining activities. Two PLOs (6068 and 5942) involved lands that were always open to mineral leasing but remain closed to mining activities. The remaining 11 revocations in California involved lands that had always been open to mineral leasing and metalliferous mining, but were reopened to nonmetalliferous mining. Thus, of the 21 revocations in California, none restored lands to both mining and mineral leasing.

(10) Nearly half of all revocations in Category D were completed in the State of Oregon.

Ninety revocations covering 55,290 acres were undertaken by BLM on its own initiative in Oregon. Of these, 33 involved lands that had always been open to mining and mineral leasing, 40 revocations involved lands that had always been open to mineral leasing and metalliferous mining, with the revocation merely reopening the land to nonmetalliferous mining. Twelve revocations involved land that had always been open to mineral leasing, but reopened the land to mining. Five revocations involving 562 acres opened the lands to both mining and mineral leasing.

(11) In Idaho, 18 revocations fell within Category D. Of these, 12 involved lands that had always been open to mining and mineral leasing. Three involved lands that had always been open to mineral leasing and metalliferous mining, and only restored lands to nonmetalliferous mining. Two involved lands restored to mining, lands that had previously been opened to mineral leasing. Only one revocation, involving 84 acres, restored land to both mining and mineral leasing.

(12) In Alaska (which is not included within the mandate of FLPMA § 204(f), one PLO was issued, revoking over 5.5 million acres which restored the land to a variety of uses.

12. In sum, of the 647 revocations that were completed since January 1, 1981, covering 18,991,920 acres, 266 of these revocations, covering 1,826,507 acres, were revoked in the ordinary course of business. An additional 211 revocations covering 4,844,853 acres were merely record clearing transactions. Of the remaining 170 revocations, involving 12,320,560 acres, only 10 revocations in the lower 48 States involving 1,201 acres restored land to both all forms of mining and mineral leasing.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct to the best of my knowledge.

/s/ VINCENT J. HECKER  
Vincent J. Hecker

Sept. 5, 1986  
Date

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF

v.

ROBERT F. BURFORD, DONALD P. HODEL, AND THE UNITED  
STATES DEPARTMENT OF THE INTERIOR, DEFENDANT

DECLARATION NO. 3 OF VINCENT J. HECKER

I. INTRODUCTION

1. I, Vincent J. Hecker, Chief, Division of Lands, of the Bureau of Land Management (BLM), United States Department of the Interior, hereby declare under penalty of perjury that the information contained in this declaration is true and accurate to the best of my knowledge. Some of the details in this declaration have been supplied by my subordinates or other sources within BLM.

2. Land classifications are similar to withdrawals in that they both segregate the land from the operation of a particular law and reserve and/or dedicate the lands for a specific use or uses. They differ both in their origin and how they are effectuated. Withdrawals can only be made at the Secretarial level while the authority to make classifications has been delegated to State Directors who in turn can delegate that authority to the district managers. It was also in these offices that BLM has been undertaking land use planning since the 1960's. By 1981, the land use planning process had implemented the requirements of

section 202 of FLPMA and the Bureau's 1979 planning regulations. Thus, the terminations were not made in isolation vis-a-vis the land use planning process but were made in the context of that process.

3. Authority to classify the public lands and to provide for their orderly disposal or retention originated with the passage of the Taylor Grazing Act of 1934. The Taylor Grazing Act authorized the Secretary of the Interior (Secretary), in his discretion, to establish grazing districts or additions thereto and/or modifications and identify vacant, unappropriated, unreserved public domain lands which were chiefly valuable for grazing and raising forage crops, or more suitable for sale, entry, or exchange. Once a grazing district was established under the Act, all forms of entry and settlement except location under the Mining Law of 1872 within the exterior boundaries of the grazing district were barred until the land was classified under Section 7 of the Taylor Grazing Act.

4. In 1936, section 7 of the Taylor Grazing Act was amended to include within the Act's scope lands which were withdrawn by Executive Orders 6910 and 6964 and incorporated the original grazing districts established pursuant to the Taylor Grazing Act. As amended, section 7 provided that all lands (virtually all the remaining vacant, unreserved and unappropriated public domain lands outside of Alaska) covered by the Act should not be subject to disposition sale or location except under the Mining Law of 1872 unless, and until, the lands were classified and opened to disposal.

5. In 1964, Congress passed the Classification and Multiple Use Act (C&MU Act), 78 Stat. 986, which provided temporary authority to the Secretary to review and classify lands for retention for interim, multiple use management, and to dispose of land meeting certain criteria. This Act expired in 1970. Hence, a new concept

of retention, albeit temporary, or interim, was introduced in relation to management of the nation's public lands. BLM thereafter began the implementation of the review and classification actions contemplated by the C&MU Act. A report published in June of 1970 recognized that BLM had acted under a congressional mandate to make their determinations as soon as possible due to the temporary duration of the Act. See *One Third of the Nation's Land, A Report to the President and the Congress*, at p. 53. Exhibit 2 to Edwards' IC affidavit.

6. A number of statutes authorized the Secretary to dispose and/or use the public lands, e.g., the Small Tract Act, the Isolated Tract Act (Revised Statue 2455), the Recreation and Public Purposes Act (R&PP Act), the Homestead Act, Section 8 of the Taylor Grazing Act, the Mining Law of 1872, Mineral Leasing Act, and the Desert Land Act. Withdrawals segregated the lands from the effect of some or all of these public land and mineral laws. All these statutes except the Desert Land Act, the R&PP Act, and the Mining Law of 1872 were repealed by FLPMA in 1976. A review of some of those statutes follows:

A. The Small Tract Act, 43 U.S.C. 682a (1964 Ed.) was enacted in 1938 and authorized the Secretary to classify lands chiefly valuable for recreation, residential, business or community purposes and to sell or lease such lands at his discretion for up to five acre tracts to eligible individuals and organizations meeting the Act's requirements. The Small Tract Act was repealed by section 703 of FLPMA.

B. The Isolated Tract Act, 43 U.S.C. 1171, (Revised Statute 2455) was originally enacted in 1895 and was amended on several occasions. It authorized the Secretary to sell tracts of isolated or disconnected

public domain lands not exceeding 1,520 acres at public auction to the highest bidder. The Act also authorized the Secretary to sell lands too rough or mountainous for cultivation, not to exceed 760 acres, to the highest bidder, even if such tracts were not disconnected or isolated within the meaning of the Act. The Isolated Tract Act was repealed by section 702 of FLPMA.

C. Section 8 of the Taylor Grazing Act, 43 U.S.C. § 315(q) authorized the Secretary of the Interior to accept title to privately owned or state lands within or outside the boundaries of a grazing district. Upon receipt of such land and in exchange thereof, the Secretary was authorized to issue a patent to lands located within a surveyed grazing district or unreserved surveyed public land equal to, but not in excess of, the acreage of the lands received. However, states were prohibited from selecting lands within a grazing district unless the lands being offered by the state were within a grazing district. Nonetheless, once a state made an application for an exchange under the Act, BLM was required to "proceed with [the] exchange at the earliest possible date and to cooperate fully with the state. . . ." 43 U.S.C. § 315(g)(c). Hence, in order to prevent such exchanges, BLM classified land for multiple use management and segregated them from the operation of section 8 of the Taylor Grazing Act. Section 8 was repealed by FLPMA. Section 705.

D. The Public Land Sale Act of 1964, 48 U.S.C. §§ 1921-27, gave the Secretary temporary authority to sell lands classified for disposal which were found chiefly valuable for (a) the orderly growth and development of a community, or (b) needed for commercial, agricultural (excluding lands capable of raising

forage crops and grazing) or industrial use. The size of a tract could not exceed 5,180 acres and had to be sold through competitive bidding at not less than the appraised fair market value. The Public Land Sales Act expired by its own terms on June 30, 1969.

E. The Desert Land Act of 1877 (DLE), 43 U.S.C. 321, *et seq.*, as amended, was designed to promote the reclamation, by irrigation, of the arid and semi-arid public lands of the west. The Act authorized the Secretary to accept declarations from individuals intending to reclaim tracts of desert land not in excess of 320 acres. Upon allowance, entrymen were given four years to make proof of reclamation to receive patents. Before entries were permitted, the Secretary had to determine that the lands were incapable of producing any agricultural crops without irrigation. The DLE was not repealed by FLPMA and remains in effect. Currently, only Idaho and Nevada have significant numbers of DLE applications. Moreover, of the applications received, less than 1% of the lands involved have been found suitable for entry.

F. The Recreation and Public Purposes Act of 1926, as amended, authorized the Secretary to classify lands for disposal to states, counties, territories, municipalities, their political subdivisions, and non-profit organizations for any recreational or public purposes. If no application was received by BLM within 18 months after the issuance of the classification notice, the segregative effect of the R&PP classification was automatically vacated and the public lands returned to their former status. See 43 C.F.R. § 2741.6. The R&PP Act was not repealed by FLPMA.

G. 25 U.S.C. § 339, as amended, commonly referred to as the Indian General Allotment Act, was

originally enacted in 1887. This Act permits Indians or Tribes not living within the boundaries of a reservation to settle upon unappropriated public land and apply for a patent to such lands in the same quantity and manner as provided for Indians residing upon reservation by the Act of February 8, 1887, ch. 119, § 1. 84 Stat. 388, as amended. This act was nondiscretionary in that BLM was required to convey patents to qualified applicants. The Indian General Allotment Act was not repealed by FLPMA.

H. The Homestead Act, 43 U.S.C. (6), *et seq.*, permitted citizens of the United States to enter in good faith not more than one-quarter section (160 acres) of unappropriated public land and file an application to receive a patent if the entry was made for the purpose of settlement and cultivation. To prevent alienation of the government's title, BLM classified millions of acres of land against appropriation under the Homestead Act. This Act was repealed by Section 702 of FLPMA.

7. By 1976, BLM had classified approximately 180,000,000 acres of lands under a variety of statutes. The vast majority of classifications were made pursuant to the C&MU Act (over 177,000,000 acres). Many of these lands were classified for retention to allow Congress an opportunity to determine how the public lands were to be utilized. When FLPMA was enacted, it provided that public lands were to be retained in Federal ownership and managed for multiple use and sustained yield unless it was determined that disposal of such lands was in the national interest. FLPMA made the C&MU retention classifications obsolete and unnecessary. Termination of these types of classifications are hereinafter referred to as Criterion A terminations.

8. One of the objectives of FLPMA was to "[w]eed out of the body of law those statutes and parts of statutes which are obsolete." See H.R. Rep. No. 1163, 94th Cong. 2d Sess. 2 (1976). At the time FLPMA was enacted, over 3,000 public land laws existed. FLPMA repealed either entirely or a portion of 253 public land laws relating to homesteads, agricultural entry, small tracts, drainage, military abandonment and sales and disposals. Approximately 125,000,000 acres of the public lands were classified or segregated against laws which no longer exist. Terminations that ended these types of classifications are hereinafter referred to as Criterion B terminations.

9. After FLPMA was enacted, BLM developed more sophisticated land use planning techniques which, *inter alia*, took into account the need to retain lands in Federal ownership and to prevent unwarranted applications under the remaining land disposal laws. Such action rendered the old classifications unnecessary. Hence, classifications that segregated against the operation of one or more public land disposal laws and where a land use plan was completed, were terminated. Terminations that ended these types of classifications are hereinafter referred to as Criterion C terminations.

10. Some classifications had segregated land against the operation of the mining laws. In many instances, such lands had only nominal mineral value and no serious interests had ever been expressed regarding mining. Prior to being segregated, these lands had always been open to mining, but very few claims, if any, had been located, and even fewer acres were ever actually disturbed. A few classifications that segregated public lands against mining where the lands contained only nominal mineral value and where no serious interest for mining existed were terminated. Termination that ended these types of classifications are hereinafter referred to as Criterion D terminations.

11. The four criteria described above, were developed by the Bureau in the late 1970's and 1980. They were defined as criteria to be used by the Bureau Field Offices in terminating classifications and were given as written instructions by the Washington office to its state offices in OAD 81-11 issued in 1981. See Exhibit 8 to Edwards' 1C Affidavit. These criteria were later restated in BLM Manual 2355. See Exhibit 21 to Edwards' 1B Affidavit. Both OAD 81-11 and the BLM Manual 2355 stated that classifications may be terminated if they met any of the four criteria noted above—namely, lands had been classified for retention only (Criterion A), the statutes against which the classifications had segregated the lands had been repealed (Criterion B), the lands had been segregated against discretionary land laws and a land use plan was in place (Criterion C), and lands had been segregated from mining and where there was only nominal mineral value and no serious interest had been expressed with regard to mining activities. (Criterion D).

12. In employing these criteria, the Bureau has terminated 617 classifications covering 153,975,381 acres since January 1, 1981. Nearly 7,000,000 acres, following the review thereof, were not terminated and/or modified but were retained. See Edwards' 1C Affidavit at ¶ 19. I am unaware of any classifications that were terminated that restored land to uses that are inconsistent with approved land use plans in effect at the time the classification was terminated or subsequently developed. The totals by the criteria identified above are as follows:<sup>1</sup>

<sup>1</sup> The classification order totals reflected herein have been calculated on the following basis: if they were terminated using more than one criterion, they have been counted only once and only in the criterion where the greatest amount of acreage appears.

A. Criterion A—Two classifications were terminated covering a total of 5,264 acres. They were both in the State of Arizona.

B. Criterion B—The vast majority of the terminations, both in number of classifications terminated and the acreage involved fall within this category. Of the total 617 classifications terminated, 516 are within this category (laws repealed by Congress). Of the 155,975,381 acres on which classifications had been terminated, 118,775,142 are within this category.

C. Criterion C—Sixty-seven classification orders were terminated in this category which covered a total of 2,359,820 acres.

D. Criterion D—Twenty-four classifications were terminated in this category covering a total of 210,155 acres. See Exhibits 1-12.<sup>2</sup>

13. The individual terminations by state within each of these criteria are attached as exhibits 2-12 to this declaration. The fact that classifications were terminated in criterion A, B or D does not mean that no land use plan had been completed or were in place at the time of the termination. The breakdown only indicates the specific criteria employed by the BLM in terminating the classification by the criteria set forth and described above.

14. An analysis of the terminations by criterion in each state is as follows:

A. In Criterion A, only two classifications were terminated as noted in ¶ 12A, *supra*. Both of these

<sup>2</sup> The figures in Exhibits 1-12 were derived from the Classification Orders and supporting case files of the BLM. Every effort has been made to make them as correct as possible. However, we are continuing to review these statistics and, if necessary, we will file an errata sheet showing any corrections that are made in view of our ongoing review.

classifications were in Arizona and covered 5,264 acres. These lands had been classified for retention and multiple use management. They segregated the lands from all forms of appropriation, including the Mining and Mineral Leasing Laws. Section 102 of FLPMA mandates that all public lands be retained and managed for multiple use and sustained yield. Thus, these retention classifications became superfluous as they had been replaced by Section 102(a)(1) of FLPMA. Therefore, termination of these two classifications was completed.

B. In Criterion B, a total of 516 classifications covering 118,775,142 acres were terminated. The following is a state-by-state breakdown and description of the effects of Criterion B terminations for each state. The rationale behind Criterion B terminations was that the classifications segregated the land from the effect of laws which FLPMA subsequently repealed. Hence, the classification became superfluous. For example, many classifications segregated lands from appropriation under the Homestead laws. Thereafter, Congress repealed the Homestead laws. Thus, the classifications had been rendered moot by Congress.

(1) *Arizona*—26 classification orders on 10,484,587 acres were terminated since January 1, 1981. These classifications segregated the lands from appropriation under the agricultural entry laws (or used in his declaration [sic], to "agricultural entry laws, refers to the Homestead Acts, the Indian General Allotment Act, and to Desert Land Act), sales under RS 2455 and the Public Land Sales Act of 1964. However, the lands had remained open during the term of the

classifications to all other public land laws including the mining and mineral leasing laws. FLPMA repealed all the aforementioned laws with the exception of the Desert Land Act, making the classifications superfluous.

(2) *Montana*—31 classification orders on 5,194,094 acres were terminated since January 1, 1981. These classifications primarily segregated the lands from appropriation under the agricultural entry laws, sales under RS 2455, and the Public Land Sales Act of 1964. The lands had remained open to appropriation under all remaining public land laws including the mining and mineral leasing laws. FLPMA repealed the authorities against which the lands had been classified, thus making the classifications totally unnecessary. Hence, they were terminated.

(3) *California*—206 classification orders on 165,435 acres were terminated since January 1, 1981. 52,232 acres of the total had been classified for disposal under the Small Tract Act and the remainder had been classified for disposal under RS 2455. FLPMA repealed RS 2455 and the Small Tract Act and, hence, the classifications became moot.

(4) *Washington*—3 classification orders on 1,418 acres of lands were terminated since January 1, 1981. These lands were classified for lease or sale for home site purposes under the Small Tract Act. When the Small Tract Act was repealed by FLPMA, making the classification no longer applicable, the classifications were terminated.

(5) *Wyoming*—20 classification orders on 12,698,007 acres of land were terminated. Two

classifications segregated 4,743 acres from appropriation under all the public land laws including the Mining Law but not the Mineral Leasing Act, and were designated for exchange under section 8 of the Taylor Grazing Act. However, Section 8 was repealed when FLPMA was passed, thus making these classifications moot. Four classification orders on 180 acres were classified for disposal under the Small Tract Act. The Small Tract Act was also repealed by FLPMA, thus making these classifications moot. The remaining 14 classifications were made under the C&MU Act.[sic] classified the lands for multiple use management and classified them for appropriation under the agricultural land laws and from sales under RS 2455. For the laws that were repealed by FLPMA, these classifications had become moot.

(6) *New Mexico*—11 classification orders on 8,744,336 acres were terminated since January 1, 1981. These classifications segregated the lands from appropriation under RS 2455 and agricultural entry laws but not from the mining and mineral leasing laws. For the laws that were repealed by FLPMA, these classifications had become moot.

(7) *Utah*—25 classification orders on 22,837,632 acres were terminated since January 1, 1981. These lands had been classified for multiple use management and segregated from appropriation under the agricultural entry laws, and sales under RS 2455. In addition to being segregated from the agricultural entry laws and sales under RS 2455, some orders also segregated the lands from exchanges under section 8 of the

Taylor Grazing Act. For the laws that were repealed by FLPMA, these classifications became moot.

(8) *Colorado*—32 R&PP classification orders totalling 6,503,885 acres were terminated since January 1, 1981. Under the terms of the classifications, the lands were only opened to appropriation under the Mineral Leasing Act and for disposal under the R&PP Act. Since no applications to obtain these lands were received within 18 months of the date the lands were classified by a qualified applicant, the classifications were automatically vacated. Subsequent termination of these classifications was appropriate since no application could be accepted upon expiration of the 18-month deadline.

(9) *Idaho*—23 classification orders totalling 5,093,369 acres were terminated since January 1, 1981. 22 classification orders on 5,076,215 acres were segregated from the agricultural entry laws and sales under RS 2455. One classification on 17,154 acres was terminated which, in addition to segregating the lands from agricultural entry and sales, also classified the land for sale under the Public Sale Act of 1964 and exchanges under section 8 of the Taylor Grazing Act. All of the aforementioned lands were classified for multiple use management and were not segregated from any other public land laws, including the Mining and Mineral Leasing Law. For the laws FLPMA repealed, these classifications became moot.

(10) *Oregon*—54 classification orders on 9,309,559 acres were terminated since January 1, 1981. These classifications segregated the lands

from appropriation under the agricultural entry laws and sales under RS 2455. The lands were classified for multiple use management and subject to appropriation under all remaining public land laws, including the Mining and Mineral Leasing Laws. Again, for the laws FLPMA repealed, these classifications became moot.

(11) *Nevada*—85 classification orders on 37,742,820 acres were terminated since January 1, 1981. 44 orders had classified 68,166 acres for disposal under the Small Tract Act. 18 orders classified 5,952 acres for exchange under Section 8 of the Taylor Grazing Act. Six orders classified 438 acres for disposal under the Public Land Sales Act and one order classified 48 acres for sale under RS 2455. The aforementioned classifications segregated the lands from all forms of appropriation under the public land laws with the exception of the Mineral Leasing Law. The remaining orders classified land for retention and multiple use management and segregated them from agriculture entry and sales under RS 2455 but kept them open to all other forms of appropriation including the Mining and Mineral Leasing Laws. For the laws FLPMA repealed, these classifications became moot.

C. With regard to classifications terminated pursuant to Criterion C, 67 classifications covering 2,359,820 acres have been terminated since January 1, 1981. These classifications were terminated because they segregated the lands from the operation of the discretionary public land laws and termination was consistent with an approved land use plan. Exhibits 2-13 list the terminations in Criteria C for each State.

The following state-by-state breakdown is not meant to be inclusive, but is intended to illustrate the typical effect of terminating classifications which segregated the land from the operation of one or more discretionary land laws with an approved land use plan in place.

(1) *Arizona*—Four classifications on 41,613 acres were terminated since January 1, 1981. For example, A-5882 terminated a classification covering 14,281 acres which had segregated the lands from all forms of appropriation including mining and mineral leasing. These lands were classified for transfer out of federal ownership under Arizona state indemnity in-lieu selection rights.

A-4184 also segregated the land from all forms of appropriation including mining and mineral leasing and classified the lands for transfer from federal ownership under Arizona state indemnity in-lieu selection rights.

(2) *California*—Forty-two classifications covering 2,242,045 acres were terminated since January 1, 1981. For example, R-697 segregated 473,964 acres from appropriation under the agricultural entry laws and sales under RS 2455. These lands were open to all other forms of appropriation and were classified for multiple use management under the Classification and Multiple Use Act. In addition, 3,810 acres were also segregated from mining but remained open to mineral leasing.

S-2577 segregated 2,920 acres for appropriation under the agricultural land laws and sales under RS 2455. In addition, 3,680 acres were

segregated from mining but remained open to mineral leasing. These lands were also classified for multiple use management and were subject to appropriation under the remaining public land laws.

S-965 segregated 169,166 acres from appropriation under the agricultural land laws and sales under RS 2455. In addition, 1,599 acres were segregated from mining but remained open to mineral leasing. These lands were classified for multiple use management and were subject to appropriation under the remaining public land laws.

R-2821 segregated 178,726 acres from appropriation under the agricultural land laws and sales under RS 2455. This was a partial termination of a classification which retained the segregation from mining on 11,341 acres. The partial termination was done because these lands which were closed to mining were located throughout several sites and used primarily for recreation; Westwell Archaeological site, Whipple Mountain Recreation and Natural Area, and the Picacho Recreation and Wildlife Area. The segregative effect against mining on the 11,341 acres were retained until a withdrawal application can be processed.

R-1390 segregated 223,397 acres from appropriation under the agricultural land laws and sales under RS 2455. It also segregated 13,556 acres from mining but remained open to mineral leasing. However, 9,216 acres remained closed to mining because these lands were located throughout several sites and used for recreational pur-

poses; Mecca Hills Recreation Area and the Coyote Spring Wildlife Area.

In those examples and in every classification terminated in California, a land use plan covering the lands was in place.

(3) *Idaho*—One part of a classification (listed under Criterion B) covering 205 acres was terminated since January 1, 1981. These lands were classified for exchange under Section 8 of the Taylor Grazing Act, for lease or sale under the R&PP Act, sales under RS 2455 and sale under the Unintentional Trespass Act. These lands were segregated from all other forms of appropriation including the mining and mineral leasing law.

(4) *Montana*—Three classifications covering 10,484 acres were terminated since January 1, 1981. For example, M-10577 terminated a classification covering 520 acres which segregated the lands from appropriation under the agricultural land laws and sales under RS 2455. The lands were classified for multiple use management.

M-15352 terminated classifications covering 1,382 acres which segregated the lands from appropriation under the agricultural land laws and sales under RS 2455. In addition, the lands were also segregated from lease or sale under the R&PP Act. These lands were also classified for multiple use management.

(5) *Oregon*—Nine classifications covering 465 acres were terminated since January 1, 1981. For example, OR-09913 segregated 134 acres from all forms of appropriation under the public land laws, except for lease and sale under the

R&PP Act. These lands were classified for recreation and public purposes.

OR-6113 segregated 72 acres from all forms of appropriation under the public land laws, including mining and mineral leasing, except sales and leases under the R&PP Act. These lands were classified for recreation and public purposes.

(6) *Nevada*—Seven classifications covering 36,313 acres were terminated since January 1, 1981. For example, N-1005A classified 31,260 acres for multiple use management. 13,940 acres were segregated from all forms of appropriation, except disposals under the R&PP Act. These lands were closed to mining, but remained open to mineral leasing. 17,323 acres were segregated from disposal under the public land laws but remained subject to appropriation of the R&PP Act and the mining and mineral leasing law.

N-892A classified 2,250 acres for multiple use management. 1,610 acres were segregated from disposal under all public land laws except the R&PP Act and the mineral leasing law. These lands were also closed to mining. 640 acres were segregated from all forms of appropriation under public land laws except for disposals under the R&PP Act and mining and mineral leasing laws.

N-045724 classified 80 acres for disposal under the Desert Land Entry Act, but these lands remained subject to all forms of appropriation, including the mining and mineral leasing laws.

(7) *Washington*—Two classifications covering 28,695 acres were terminated since January 1, 1981. These lands were classified for multiple use

management and were segregated from agricultural entry and sales under RS 2455. They remained open to all other forms of appropriation, including the mining and mineral leasing law.

No classifications in Criterion C were terminated in Colorado, New Mexico, Utah and Wyoming.

D. Using Criteria D, 24 classifications covering 210,155 acres were terminated since January 1, 1981. The terminations using Criterion D involved classifications that had segregated lands of nominal mineral value from entry under the mining laws. As stated earlier, little interest was expressed to have these lands open to mineral development.

Exhibits 2-12 identifies terminations using criterion D for each state. The following individual state-by-state breakdowns highlights these terminations.

(1) *Arizona*—One classification covering 8,219 acres was terminated since January 1, 1981. A-1351 terminated a multiple use classification which prevented appropriation under both the mining and mineral leasing laws.

(2) *Colorado*—Parts of 6 classifications (listed in Criterion B), covering 2,679 acres were terminated since January 1, 1981. For example, C-3357 terminated a multiple use classification on 1,653 acres. This land was segregated from appropriation under the mining law, but remained open to mineral leasing.

(3) *Montana*—Three classifications covering 43,666 acres were terminated since January 1, 1981. For example, M-7991 terminated a classification on 14,271 acres which were classified for multiple use management and segregated from

mining but open to location under the mineral leasing law.

(4) *Oregon*—One classification covering 2,370 acres was terminated since January 1, 1981. OR-437 terminated a multiple use classification on 19,271 acres which were classified for multiple use management and segregated from mining. However, these lands were never closed to mineral leasing and were subject to appropriation under that law.

(5) *Utah*—Parts of six classifications (listed in Criterion B), covering 132,343 acres were terminated since January 1, 1981. U-2923 terminated 151 acres of a multiple use classification which segregated the land from mining, but not mineral leasing. U-8131 terminated 2,550 acres of a multiple use classification which closed the lands to mining but not mineral leasing. U-6047 terminated 242 acres of a multiple use classification which closed the lands to mining but not mineral leasing.

(6) *Washington*—Seven classifications covering 7,702 acres were terminated since January 1, 1981. OR-5430 terminated 5,099 acres of a disposal classification which designated these lands for disposal under Section 8 of the Taylor Grazing Act, the Public Land Sale Act of 1964, sales under RS-2455, and sale and lease under the R&PP Act. This classification segregated the land from the operation of the mining law, but did not segregate them from appropriation under the mineral leasing law. OR-6353 terminated 1,274 acres of a disposal classification which designated these lands for disposal through exchange under Section 8 of the Taylor Grazing

Act. This classification segregated the land from all other forms of appropriation, including the mining law. They were, however, subject to appropriation under the mineral leasing law.

(7) *Wyoming*—Twelve classifications covering 13,176 acres were terminated since January 1, 1981. For example, W-022567 terminated 5,614 acres of a multiple use classification which had closed the lands to mining but not mineral leasing. Similarly, W-0200621 terminated 4,197 acres of a multiple use classification which closed the lands to mining but not to mineral leasing. W-0304203 terminated R&PP Act classification which closed the lands to all forms of appropriation, including mining and mineral leasing.

California, Idaho, New Mexico, and Nevada had no terminations using Criterion D.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Sept. 5, 1986

Date

/s/ VINCENT J. HECKER

Vincent J. Hecker

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF

v.

ROBERT F. BURFORD, DONALD P. HODEL, AND THE UNITED  
STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS

DECLARATION OF DAVID C. WILLIAMS

1. I, DAVID C. WILLIAMS, Chief, Division of Planning and Environmental Coordination, Bureau of Land Management (BLM), United States Department of the Interior, Washington, D.C., hereby declare under penalty of perjury that the information contained in this affidavit is true and accurate to the best of my knowledge. Some of the details in this declaration have been supplied by BLM planning specialists and other sources within BLM.

2. The purpose of this declaration is to describe briefly: (1) the history of formal land use planning for the BLM-managed public lands; (2) the types of land use plans that have been—and are being—used by BLM; and (3) how these plans relate to the planning principles of section 202 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1712.

HISTORY

3. Throughout the two hundred year history of the Nation's public lands, the dominant policy of the United States toward those lands has been one of disposal out of

federal ownership and into state or private control. Only within the last twenty years or so has there emerged a firm policy of retention and disposal. This shift in policy has resulted in a multiple use management—planning philosophy with respect to the public lands remaining in BLM's custody.

4. Formal land use planning was first introduced within BLM during the 1960's. Planning was focused on program activities at the BLM district level.<sup>1</sup> Functional land use development plans covering each major land use program (e.g., livestock grazing, wildlife habitat, recreation, timber, minerals) were called for. However, these plans did not produce a coordinated, long-range, multiple-use management framework for decisionmaking. To remedy this, a new planning system, centered on smaller "planning units", was introduced. The plans developed out of this new system were called Management Framework Plans (MFPs).

5. Work on the first MFPs was started in 1969. Five prototype plans were developed and, from the lessons learned in this experimental process, coupled with experience gained during subsequently developed MFPs, extensive revisions in the planning system were implemented in 1975 through the BLM manual. The revisions served to strengthen the relationships between planning decisions and the analysis of resource information including environmental concerns and social-economic data. Many of the MFPs in use today were prepared using this 1975 manualized guidance. By 1979, approximately 80 percent of the

<sup>1</sup> BLM management activities have been implemented largely through a basic administrative subdivision called the resource area. Two or more such areas comprise a district, and within each of the western states there are a number of BLM districts. The districts in each state are supervised by a BLM State Director.

BLM-managed lands in the contiguous western states had been included in MFPs.

6. The BLM planning system, as it evolved in the late 1960's and early 1970's was not driven by statute. BLM recognized the need for planning to resolve land use conflicts and to allocate limited resources. Without statutory requirement, BLM developed the MFP process to meet those needs. BLM received funding for, and thus implicit approval of, the MFPs from the Congress.

7. In section 202 of FLPMA, Congress specified by statute for the first time a number of planning principles to be observed by BLM in the development and revision of its land use plans. Moreover, existing MFPs were to be reviewed to ensure that each plan complied with the principles prescribed in section 202. Also, Interior was directed to issue regulations affording to the public opportunities for participation in the planning process.

8. Early in 1977, work was commenced to implement rulemaking for section 202. Discussion packages containing draft regulations were made available to the public and a *Federal Register* notice of intent to propose rulemaking was published in March of 1978. 43 C.F.R. 8814 (March 3, 1978). Comments on the draft regulations were received from 130 sources. In December of 1978 proposed rulemaking was published. 43 F.R. 58764 (December 15, 1978). Again, numerous comments and suggestions were received. On September 6, 1979, the final rules took effect. 44 F.R. 46386 (August 7, 1979). As adopted, the rules:

- introduced a revamped planning system, incorporating the principles prescribed by section 202 of FLPMA;
- called for Resource Management Plans (RMPs), keyed to BLM resource areas and designed to even-

tually replace the MFPs over an indeterminate period of time designated as the "transition period";

- preserved MFPs until superseded by RMPs, but only if the MFPs complied with the "principles of multiple use and sustained yield and shall have been developed with public participation and governmental coordination. . . ." 43 C.F.R. 1601.8(b)(1) (1979).

The purpose of section 1601.8(b)(1), which in 1983 was renumbered as 1610.8(a)(1),<sup>2</sup> is to secure MFP compliance during the transition period with the statutory requirements for BLM land use plans as mandated by section 202 of FLPMA. Thus, each MFP must be considered separately to determine its validity in relation to section 202 planning principles.

9. In October of 1979, six pilot RMP planning projects were inaugurated under the new BLM regulations. These projects were used to gain practical experience in operating under the regulations and to translate this experience into a bureau-wide implementation strategy. On the strength of this experience, 21 RMPs were started in the fall of 1980. To date, about 70 RMPs, out of an expected total of from 140 to 150 RMPs have been started, and 25 RMPs have been approved and are in operation. The average planning area covers approximately 1,000,000 acres of public land. BLM requires about two and one-half to three years of interdisciplinary effort to produce an RMP at a cost of about \$450,000. In some cases, plans have exceeded \$1,000,000 in cost. BLM's annual budget expenditures for land use planning dropped from a Fiscal Year 1981 high of almost \$15,000,000 to \$9,047,000 in Fiscal Year 1986. Because of the budget cutbacks and expected future reductions, the availability of skilled special-

<sup>2</sup>48 F.R. 20364, 20375 (May 5, 1983).

ists needed to prepare the plans has been substantially curtailed. It is estimated that at current budget rates and reduced manpower levels, the process of phasing in the RMPs cannot be completed before 1996, assuming BLM prepares RMPs at a level rate and abandons its policy of preparing new RMPs only as they are needed to address management issues or replace outmoded MFPs.

#### PRE-FLPMA PLANNING

10. MFPs provided BLM with a highly detailed planning base for making land use decisions and allocating resources in the context of multiple-use management. The 1975 BLM manual defined an MFP as a planning decision document establishing for a given public land area, land use allocations, coordination guidelines for multiple use, and objectives to be achieved for each class of land use or protection.

11. The MFPs were, in practice, very detailed and complex sets of documents requiring significant amounts of data, analysis, and public participation. The MFP incorporated an interdisciplinary approach to planning and, where appropriate, addressed each of the following resource and support programs: Lands, Minerals, Forestry, Range, Watershed, Wildlife, Recreation, Cadastral Survey, Fire Protection, Roads and Trails, Buildings and Yards, Access/Transportation/Rights-of-Way, and General Administration. In addition, the MFP process was designed to include in the development of land use plans such principles as issue identification, inventory of resources, public participation, social-economic assessment, environmental impact analysis, conflict resolution, and coordination with affected federal, state, and local agencies. Paragraphs 12-18 outline the steps called for in the 1975 BLM manual to ensure the effective use of these principles.

12. A *pre-planning analysis* was prepared for each MFP planning unit to identify issues to be addressed, level of planning detail, inventory needs, scheduling requirements, and dollar and personnel resources needed to complete the plan. The planning team reviewed national level policy guidance and general criteria, as set out in the BLM manual and other relevant documents.

13. Concurrently, the planning team prepared a *public participation plan* to identify interested and affected publics, develop a strategy for obtaining input throughout the planning process, and for communicating decisions once they had been made. Appendix 2 to the 1975 BLM manual, section 1601, Public Participation in the Planning Process, provided extensive guidance on how BLM's planning teams might effectively implement the public participation plans and solicit public input into MFPs and related planning documents. In actual practice, public participation was most often solicited through notices, brochures, mailouts, field tours, open houses, public meetings, formal hearings, and individual contacts with numerous individuals, groups, organizations, public land users, and state and local government agencies. Typically, BLM would begin soliciting input before the formal planning process was begun and would continue throughout the process until after the planning decisions had been made.

14. Early in the planning process, a *social-economic profile* (SEP) was prepared for the state or region of which the planning area was a part. The SEP analyzed major social and economic trends and issues. Also, it described governmental infrastructures that impacted the management of public lands and associated resources. Additionally, the document set forth BLM's relationship with other planning and land use control groups and listed agencies, groups, and individuals who might need to be consulted

during the development and implementation of the land use plan. The SEP was to be used as a tool by the planning team in preparing other portions of the plan.

15. Before BLM prepared its planning recommendations in the MFP, it undertook a comprehensive collection and analysis of resource data for each of the programs listed above in paragraph 11. This crucial process took place in four steps in what BLM called a *Unit Resource Analysis* (URA). Step 1 entailed preparation of a *base map* displaying planning area boundaries and landownership status to facilitate the recording of resource data later in the development of the plan. Step 2 consisted of an in-depth *physical profile* or description of resource elements, including climate, topography, geology and soils, vegetation, water resources, animals, fire, limiting factors, and developments. Step 3 involved the description and analysis of the *present situation* for each major resource category, including evaluations of current use, production, trends, conflicts, and resource quality. Concurrently, an *ecological profile* was prepared that analyzed ecological conditions and interrelationships in the planning area. In Step 4, BLM analyzed all feasible *management opportunities* for each resource category and examined options for improving ecological quality. The last three steps entailed extensive consultation with various publics and user groups and often were preceded by inventories to gather data needed for the analysis. The 1975 BLM manual called for extensive narratives and graphic overlays to document the descriptions and analyses. Typically, a completed URA would consist of several volumes of data and as many as 100-150 large, mylar overlays to be used in conjunction with the base map. The URA provides an extremely valuable source of information, not only for BLM resource specialists involved in the development and imple-

mentation of the MFP, but for state, regional, and local land use planning agencies which rely heavily on the information.

16. Data and analyses provided by the URA and SEP were then used by the BLM planning team to prepare a *Planning Area Analysis* (PAA). Among other things, the PAA analyzed the significance of public lands and resources to users and institutions in the vicinity, developed demand projections for public lands and resources in the planning area, and analyzed the significance of "critical environmental areas" as defined by state or federal law. The PAA was intended to facilitate development of resource objectives and recommendations in the MFP and to help evaluate the significance of various conflicts during the multiple use analysis.

17. Following completion of the URA and PAA, BLM planning teams began preparation of the MFP. The planning team drew upon all of the previous analyses and solicited public participation in the development of planning objectives and recommendations. An MFP was completed in three steps. During Step 1, each resource specialist developed *objectives* to be reached for a particular resource program and made specific *recommendations* as to how each objective was to be achieved. The recommendations were to reflect BLM policy and were to be responsive to social, economic, and environmental needs. At Step 2, the responsible BLM manager conducted the *Multiple Use Analysis* which entailed an analysis of impacts of the Step 1 recommendations and identification of conflicts between various resource programs. In conducting this analysis, the BLM manager was to consider the respective values of the resources involved, the magnitude of the impacts, and the significance of values that would be gained or lost. The BLM manager then reconciled conflicting recommendations and, where appropriate, considered alternatives to

reaching the objectives identified in Step 1. The manager's decisions became the multiple use recommendations.

18. Step 3 of the MFP was completed by the appropriate BLM District Manager who decided whether to accept, reject, or modify the multiple use recommendations made in Step 2. Summaries of the MFP Step 3 decisions were commonly prepared and sent to persons who had participated in the planning process and other interested parties. Decisions on certain resource programs, such as livestock grazing, might be deferred until completion of programmatic environmental impact statements where such were required. Although compliance with sections 102(2)(A) and (B) of the National Environmental Policy Act (NEPA), 42 U.S.C. 4332(2)(A) and (B), was generally accomplished throughout the planning process, specific compliance with section 102(2)(C) was generally reserved until specific planning recommendations were proposed for implementation.<sup>3</sup>

19. MFPs were very detailed and assessed virtually all resource programs found within the planning area. Nonetheless, implementation of planning decisions for certain activities required more specific analysis and coordination with public land users and affected publics upon approval of the MFP. Such detailed planning was later prepared by individual resource programs. These planning documents, known as *activity plans*, were generally prepared on a site specific basis involving smaller geographic areas. The plans were prepared with public participation and were preceded by NEPA compliance. The intent to prepare ac-

<sup>3</sup> In general, NEPA section 102(2)(A) requires federal agencies to use an interdisciplinary approach in planning and decisionmaking. NEPA section 102(2)(B) requires that consideration be given to unquantified environmental amenities and values in decisionmaking. NEPA section 102(2)(C) requires the preparation of an EIS for major, federal agency actions.

tivity plans was usually cited in the MFP, but plans could be prepared whenever BLM recognized need for them in order to implement an MFP decision. Activity plans were commonly prepared for such resources as wildlife (Habitat Management Plan), wild horses and burros (Herd Management Area Plan), forestry (Timber Management Plan), realty actions (Lands Activity Plan), recreation (Recreation or Wilderness Management Plan), and road maintenance (Transportation Plan).

20. MFPs and related planning documents were, thus, comprehensive in nature and embodied state-of-the-art principles of planning and environmental assessment. Many of the principles, terms, and concepts used or developed in the pre-FLPMA MFP process were incorporated into the planning requirements of FLPMA, section 202, and now provide standards for BLM's current planning process. MFPs prepared in accordance with the relevant BLM manual sections for those plans substantially meet all nine of the planning principles identified in section 202 of FLPMA. Specifically, MFPs: 1) promote the principles of multiple use as set forth in applicable law, (see page 7, Glossary, BLM Manual 1601, release 1-952, 3/6/75; 2) use a systematic interdisciplinary approach in considering physical, biological, economic and other sciences as described in the 1975 BLM Manuals 1601, 1603, 1605, 1607, and 1608; 3) consider the identification and protection of critical environmental areas as generally described in the BLM Manual 1607.5, release 1-959, 3/28/75, and as further provided by specific resource programs in the URA Step 3 and MFP Steps 1, 2, and 3; 4) rely on an inventory of the public lands and their resources as provided in Steps 1 and 2 of the URA; 5) consider present and potential uses of the public lands as provided in Steps 3 and 4 of the URA and Steps 1 and 2 of the MFP;

6) consider relative values of resources involved and alternative means for enhancing those values as provided in URA Step 4 and MFP Step 2; 7) consider long-term and short-term benefits and impacts in MFP Steps 1, 2, and 3; 8) provide for compliance with applicable state and federal pollution laws as described in the PAA and URA Step 3, and through the resource program recommendations of MFP Steps 1, 2, and 3, (see, for example, Watershed, BLM Manual 1608.36, release 1-955, 3/19/75); and 9) provide for extensive coordination with state and local governments and other federal agencies in conducting inventories and developing planning recommendations, taking into account the views of these agencies and giving full consideration to plans and programs developed by them (see Intergovernmental Cooperation in the Planning Process, BLM Manual 1601.8, release 1-952, 3/6/75). Attached as Exhibit 3 is relevant Planning Guidance from the BLM Manual.

#### POST-FLPMA PLANNING

21. After FLPMA was enacted on October 21, 1976, BLM continued to prepare MFPs using the 1975 BLM manual instructions until they were discontinued substantially on February 2, 1983. After the planning regulations became operative in 1979, the 1975 instructions were used with the regulations in the blending process for transition MFPs, as described in paragraph 24.

22. As stated above in paragraph 8, the planning regulations for section 202 of FLPMA became effective on September 6, 1979. The regulations were issued primarily to respond to the public participation requirements of FLPMA in connection with the planning process. As they evolved, the regulations closely followed the rulemaking for land use plans applicable to National Forest System

lands. This was not intended originally. BLM's initial course of action was documented in its draft regulations package of early 1978. In essence, that course provided for the incorporation of the 1975 BLM manual guidance for MFPs into rulemaking. But with greater emphasis on certain principles set out in FLPMA (e.g., giving priority to AOEC designations, consistency with state and local plans) [sic]. Other modifications reflected suggestions by the American Society of Planning and by BLM officials experienced in MFP preparation. However, the essential elements of the MFP process were intended to be preserved. All of this was changed, however, during the proposed rulemaking stage when BLM decided to adopt the nine step planning process as used by the Forest Service in developing its land use plans. This was done to reduce the complexities of the planning process in the public's mind and, consequently, to encourage public participation in the land use planning of the Nation's two largest multiple use land management agencies — BLM and the U.S. Forest Service. Thus, as it turned out, the proposed rulemaking of December 15, 1978, differed materially from BLM's original draft regulations. The changes involved, among other things, establishing a combined planning and NEPA process (an EIS for each land use plan is prepared as the plan is produced), the packaging of each land use plan and EIS into a single document, provisions for administrative review of planning decisions, and using the plans as a basis for unsuitability reviews as called by section 522 of the Surface Mining Control and Reclamation Act, 30 U.S.C. 1272.

23. The new BLM planning regulations also implemented the planning principles set out in section 202 of FLPMA. To ensure full MFP compliance, and to protect an MFP from invalidity claims relative to FLPMA 202 compliance, section 1601.8(b)(1) (1979) was added to the regulations. Also, Instruction Memorandum No. 80-109,

dated November 23, 1979, was issued. It states in part that:

Paragraph 1601.8(b)(1) requires management framework plans to be examined and found satisfactory against a set of prescribed standards before they can be used as a base for decisions. Management framework plans which do not meet the prescribed standards are invalid and may not be used as a basis for management decisions.

Thus, only those MFPs passing the compliance review required by this instruction were to be retained and used during the transition period referenced in the regulations. The 1984 BLM Manual, Section 1618, further amplifies the compliance review requirement for MFPs.

24. The BLM planning regulations provide for not only the use of RMPs but also for the use of MFPs and the completion and use of transition MFPs. As to the latter, the original 1979 regulations provided, at 43 CFR 1601.8(a), that the Director "shall establish those portions of these regulations which are to be used in the completion of those plans, given time and budgetary constraints established through Federal budgets, and legally mandated schedules." The BLM Director's determinations relative to this requirement were published in the *Federal Register*. 44 F.R. 69374 (December 3, 1979). The Director identified 88 transition MFPs, all of which were to be completed after September 6, 1979. These MFPs were subdivided into four categories for the purpose of blending their preparation into the new procedures of the planning regulations.

<u>Category</u>	<u>Scheduled Date of Completion</u>
A	FY 80
B	FY 81
C	FY 82
D	FY 83

The planning regulations were phased in differently for each category. Category A transition MFPs, were well advanced by the time the regulations were adopted and, therefore, their development did not follow substantially the new procedures of the regulations. On the other hand, the procedures followed in the preparation of the Category D transition MFPs were more fully governed by new regulations.

25. Interior's policy is to initiate an RMP only when management issues so require. The "transition period" regulations reflect this policy.<sup>4</sup> Also, the regulations provide for MFP amendments during the transition period. MFP amendments, rather than an RMP, are initiated when (1) there is only a single issue, (2) the existing MFP does not adequately address the issue, and (3) preparation of the amendment – when compared to the preparation of an RMP – will be cost effective.

26. The planning regulations mandate public notice and opportunities for public participation at five specific

<sup>4</sup> This policy was stated and restated during the rulemaking process. See, for example: 43 F.R. 58767 (December 15, 1978) (MFPs remain valid until revised, over time, with RMPs. Areas with critical problems come first, while other areas will continue under MFPs for longer periods); 46 F.R. 57448 (November 23, 1981) (To be more responsive to program needs and public understanding, the regulations are being revised so as to permit more readily the existing MFPs to continue to be used until such time as they can be replaced with RMPs).

points in the development process for RMPs. 43 C.F.R. § 1610.2(f). These opportunities for public participation are required as well for all RMP and MFP amendments. As to each transition MFP, the public participation requirements were applied to the balance of the planning process that still had to be completed after the regulations took effect. Before the planning regulations took effect on September 6, 1979, public participation procedures in the planning process followed the 1975 BLM manual guidelines.

27. Attached as Exhibit 1 are copies of maps, prepared by each of the BLM State Offices, showing the areas in the contiguous western states and Alaska that are covered by respectively, MFPs and RMPs. These maps show the areas covered by the 25 RMPs and the 88 MFPs that have become operative since the planning regulations took effect in 1979. The California Desert Conservation Area Plan, completed in 1980 pursuant to FLPMA section 601, 43 U.S.C. 1781, is not displayed.

28. RMPs are developed by the BLM district and resource area managers, using an interdisciplinary team. The RMP process involves nine planning actions:

- Identification of Issues
- Development of Planning Criteria
- Inventory Data and Information Collection
- Analysis of the Management Situation
- Formulation of Alternatives
- Estimation of Effects of Alternatives
- Selection of Preferred Alternative
- Selection [sic] the RMP
- Monitoring and Evaluation

On April 6, 1984, BLM issued manual guidance to the preparation of RMPs. BLM also has distributed to the public a [sic] explanatory brochure entitled *A Guide to Re-*

*source Management Planning on the Public Lands*. This brochure, attached as Exhibit 2, contains a general description of the RMP process, including the nine steps mentioned above, with particular emphasis on the opportunities for public participation.

29. The principal differences between RMPs and MFPs are briefly described below:

(a) *Planning Area*: An RMP would generally cover a larger area than an MFP. In 1975, the public lands were subdivided into about 350 planning units for MFPs. Because RMPs are usually prepared for entire resource areas, it will only require about 150 RMPs to cover completely the remaining public lands in BLM's custody.

(b) *Environmental Impact Statement*: Under the planning regulations, an EIS is prepared as a matter of course for each RMP. By policy and regulation, Interior has determined that the preparation of an RMP is a major federal action significantly affecting the human environment. EISs were prepared during the preparation of MFPs only where required for particular program recommendations or when specific actions were proposed for implementation.

(c) *Plan Consistency*: FLPMA section 202(c)(9) states in part:

Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

The RMP process accommodates this consistency mandate. While MFPs were prepared with inter-governmental coordination, consistency with plans of state and local governments was not strictly required. This requirement was factored into the transition

MFPs after Fiscal Year 1980 as well as into all MFP amendments.

(d) *Areas of Critical Environmental Concern:* Under the RMP procedures, priority is given to the designation and protection of areas of critical environmental concern (ACEC's). Under MFP procedures, ACEC designation was not required nor was special priority assigned. However, certain areas requiring special management were identified as "critical environmental areas."

(e) *Plan document:* The RMP is published and distributed to the public as a single planning document. By comparison, the MFP is a [sic] extensive collection of work sheets, narratives, and maps with overlays which, because of its size and composition, is not subject to widespread distribution. A summary of MFP decisions often was printed as a separate document and distributed.

(f) *Protests:* RMP procedures allow participants to protest provisions of a proposed RMP at the end of the planning process. Protest triggers an administrative review. No protest or administrative review was afforded under the MFP procedures.

As indicated previously, however, MFPs passing BLM compliance determinations are valid land use plans insofar as compliance with the planning principles of FLPMA section 202.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on this 5th day of September, 1986.

/s/ DAVID C. WILLIAMS  
David C. Williams

## Supreme Court of the United States

No. 89-640

MANUEL LUJAN, JR.,  
SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

NATIONAL WILDLIFE FEDERATION, ET AL.

ORDER ALLOWING CERTIORARI.

Filed January 16, 1990.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

January 16, 1990

Justice O'Connor took no part in the consideration or decision of this petition.

**In the Supreme Court of the United States**

OCTOBER TERM, 1989

**MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,  
ET AL., PETITIONERS**

**v.**

**NATIONAL WILDLIFE FEDERATION, ET AL.**

**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF FOR THE PETITIONERS**

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## QUESTIONS PRESENTED

1. Whether, in a lawsuit challenging a vast array of government decisions affecting the use or disposition of approximately 180,000,000 acres of public land, an environmental organization may establish its standing to sue by relying on an affidavit asserting that one member of the organization makes use of property "in the vicinity of" a particular 2,000,000-acre parcel, only 4,500 acres of which were affected by one of the challenged decisions.

2. Whether the district court properly entered summary judgment against the respondent for its failure to make a timely showing of its standing to sue.

## II

### PARTIES TO THE PROCEEDING

The petitioners are Manuel Lujan, Jr., in his official capacity as Secretary of the Interior; Cy Jamison, Director of the Bureau of Land Management; and the Department of the Interior. The respondent is the National Wildlife Federation. In addition, the following parties intervened in the proceedings before the district court: Mountain States Legal Foundation; Rep. John Seiberling, succeeded by Rep. Bruce Vento, who intervened for the purpose of supporting respondent on Count II of the Complaint; and The Trust for Public Land, The Department of Water and Power in the City of Los Angeles, The County of Inyo, California, and The California Energy Company, Inc., each of which intervened for the purpose of obtaining an exemption from the preliminary injunction. Finally, ASARCO, Inc. sought intervention in the district court and, as a party to the proceedings before the court of appeals, appealed from the denial of intervention.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1989

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No. 89-640

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,  
ET AL., PETITIONERS

v.

NATIONAL WILDLIFE FEDERATION, ET AL.

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*ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT*

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**BRIEF FOR THE PETITIONERS**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 878 F.2d 422. The opinion of the district court (Pet. App. 26a-37a) is reported at 699 F. Supp. 327. Prior opinions of the court of appeals (Pet. App. 38a-115a, 116a-118a) are reported, respectively, at 835 F.2d 305 and 844 F.2d 889, while prior opinions of the district court (Pet. App. 119a-136a, 137a-150a) are reported, respectively, at 676 F. Supp. 271 and 676 F. Supp. 280.

**JURISDICTION**

The judgment of the court of appeals (Pet. App. 151a-152a) was entered on June 20, 1989. On September 10, 1989, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 18, 1989, and the petition was filed on that day. It was

granted on January 16, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2 of the Constitution extends "[t]he judicial Power \* \* \* to all Cases [and] \* \* \* Controversies."

The Administrative Procedure Act, 5 U.S.C. 702, provides, in relevant part:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

### STATEMENT

Respondent National Wildlife Federation brought this action to challenge hundreds of executive branch decisions affecting approximately 180,000,000 acres of public land. In support of its standing to sue, respondent submitted an affidavit of Peggy Kay Peterson, one of its members. Peterson alleged an injury to her use of land "in the vicinity of" a 2,000,000-acre area known as Green Mountain/South Pass, Wyoming, arising from a decision by the Bureau of Land Management to terminate "Classification W-6228," which had shielded from mining activity some 4,455 acres scattered within the region. On the basis of the Peterson affidavit alone, the court of appeals found respondent to have standing to challenge not only the single decision from which Peterson's injury allegedly arose, but also hundreds of other decisions, affecting many millions of additional acres of public land.

#### A. The Bureau of Land Management's Review of "Withdrawals" and "Classifications" of Public Lands

##### 1. "Withdrawals" and "Classifications" of Public Lands

For much of the Nation's history, federal lands policy was designed to dispose of public lands, not manage them. In the nineteenth century, for example, Congress enacted

homesteading laws allowing citizens to obtain title to federal land simply by living on it, 43 U.S.C. 161 *et seq.*, or to secure mineral rights simply by staking a claim and mining the land, Mining Law of 1872 (Act of May 10, 1872), 30 U.S.C. 22 *et seq.* Congress also granted large tracts to the railroads and to newly formed States. See, e.g., "An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean," Act of July 1, 1862, ch. 120, 12 Stat. 489 (July 1862), as amended, Act of July 2, 1864, ch. 216, 13 Stat. 356 (July 2, 1864); Wyoming Act of Admission, ch. 664, §§ 1-14, 26 Stat. 222-224 (July 10, 1890).

During those early years, the only way to reserve land from the operation of such disposal laws was to effect a "withdrawal." A "withdrawal" removes or segregates a specific tract of land from the public domain, and thus from the application of one or more disposal laws.<sup>1</sup> J.A. 140. Typically, the Department of the Interior "withdrew" particular parcels for specific uses—such as, for example, military bases, dams, or irrigation and agricultural projects. J.A. 140-141.

In 1934, Congress supplemented the Secretary's withdrawal authority by adding a second tool—"classification." The Taylor Grazing Act, ch. 865, 48 Stat. 1269 (as amended, 43 U.S.C. 315f), gave the Secretary broad authority to "classify" public lands as suitable for either disposal or federal retention and management.

Armed with both withdrawal and classification authority, President Roosevelt issued two executive orders (Exec. Order No. 6910, Nov. 26, 1934; Exec. Order No. 6964, Feb. 5, 1935), temporarily withdrawing all unreserved public land from disposal, until such time as those lands could be classified. *Andrus v. Utah*, 446 U.S.

<sup>1</sup> Although withdrawals occurred at the President's order as early as the nineteenth century, the President first obtained specific congressional authority to withdraw lands in the Pickett Act of 1910 (Act of June 25, 1910), ch. 421, 36 Stat. 847, repealed by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2792.

500, 511-520 (1980). Pursuant to the Taylor Grazing Act, 43 U.S.C. 315f, and the 1964 Classification and Multiple Use Act, 43 U.S.C. 1411 *et seq.*, 78 Stat. 986 (expired 1970), the Secretary was thereafter required to review the public lands and determine which should be classified for retention in federal ownership, and which should be classified for disposal. By 1970, the Secretary had classified some 177,630,000 acres of public land for retention. J.A. 99. In addition, as a result of further congressional and executive action, withdrawals had removed many millions of additional acres from the operation of the public disposal laws and from multiple use management. Public Land Law Commission, *One Third of the Nation's Land* 53 (1970).

Over time, however, the ad hoc, eclectic system of classifications and withdrawals proved unmanageable. By 1970, the Public Land Review Commission, appointed by Congress to study the matter, found that "virtually all" of the country's public domain had been withdrawn or classified for retention. The Commission "experienced great difficulty" in discerning "the extent of existing Executive withdrawals and the degree to which withdrawals overlap each other." *One Third of the Nation's Land*, *supra*, 52. It also discovered that federal agencies had not maintained "accurate records that show the purposes for which specific areas ha[d] been withdrawn," or the "uses that [could] be made of such areas under the public land laws." *Ibid.* The Commission therefore recommended a complete review of existing withdrawals and classifications—"a necessary step," the Commission declared, "to 'free' the public lands of encumbrances to effective land use planning for the future." *Id.* at 52-53.

## 2. The Federal Land Policy and Management Act (FLPMA)

In light of the Commission's recommendations, Congress, in 1976, enacted the Federal Land Policy and Management Act, 43 U.S.C. 1701 *et seq.* (FLPMA),

which embodied many of the Commission's objectives. FLPMA repealed most of the miscellaneous laws governing disposal of public land, Sections 1701 *et seq.* The Act also stated an explicit policy in favor of retaining public lands for multiple use management. The statute prescribed that management of public land was to be "on the basis of multiple use and sustained yield unless otherwise specified by law."<sup>2</sup> Section 102(a)(1), 43 U.S.C. 1701(a)(1). And to achieve its overall objectives, FLPMA required land use planning for all of the public lands.

Although FLPMA did not mandate a particular type of land use plan, it did identify nine criteria that land use plans should reflect. Section 202(c), 43 U.S.C. 1712(c), requires that planners (1) observe the principles of multiple use and sustained yield; (2) use an interdisciplinary approach; (3) give priority to the designation and protection of areas of critical environmental concern; (4)

<sup>2</sup> Under FLPMA Section 103(c), 43 U.S.C. 1702(c).

The term "multiple use" means the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific, and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

Section 103(h) defines "sustained yield" as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use." 43 U.S.C. 1702(h).

rely on the inventory of the public lands to the extent it is available; (5) consider present and potential uses of the public lands; (6) consider relative scarcity and alternatives to resource exhaustion (including recycling); (7) weigh long-term benefits against short-term benefits; (8) provide for compliance with applicable pollution control laws; and (9) coordinate land use inventory, management, and planning with the land use planning and management programs of other federal agencies, States, and local governments.

Those nine criteria, however, were not novel. Well before FLPMA was enacted, BLM had begun to effect multiple use management by developing Management Framework Plans (MFPs). By late 1969, the Bureau had developed detailed procedures for comprehensive land use planning through MFPs, and MFPs have continued to be used after FLPMA's enactment.<sup>3</sup> In 1979, BLM issued revised regulations calling for the development of a different type of plan, known as a Resource Management Plan (RMP). 43 C.F.R. 1610.8(a) (1988). Those regulations recognize the continued use of MFPs, and provide for the gradual phase-in of RMPs to replace the MFPs when appropriate. See, e.g., 55 Fed. Reg. 4911 (Feb. 12, 1990).

In addition to prescribing the use of planning criteria, FLPMA confers upon the Secretary broad authority to manage the public lands—including the authority to review existing classifications and withdrawals. With respect to classifications, Section 202(d), 43 U.S.C. 1712(d), provides:

Any classification of public lands or any land use plan in effect on October 21, 1976, is subject to review in the land use planning process conducted under this section, and all public lands, regardless of classification, are subject to inclusion in any land use plan developed pursuant to this section. The

<sup>3</sup> In fact, FLPMA itself recognizes the existence of MFPs. Section 202(d), 43 U.S.C. 1712(d) (discussing land use plans "in effect on October 21, 1976").

Secretary may modify or terminate any such classification consistent with such land use plans.

In addition, Section 204(a), 43 U.S.C. 1714(a), authorizes the Secretary to "make, modify, extend or revoke" withdrawals. Pursuant to Section 204(l), 43 U.S.C. 1714(l), moreover, the Secretary is required to complete a review of all withdrawals of non-BLM administered federal lands in 11 Western States, and to report his findings to the President for transmission to Congress by 1991. Congress also directed the Secretary generally to review all withdrawals in those 11 States that *closed* federal lands managed by BLM and the United States Forest Service to appropriation under the Mining Law of 1872 (Act of May 10, 1872, ch. 152, 17 Stat. 91, as amended; 30 U.S.C. 22 *et seq.*) or to leasing under the Mineral Lands Leasing Act of 1920 (ch. 85, 41 Stat. 437, as amended; 30 U.S.C. 181 *et seq.*). Section 204(l)(1), 43 U.S.C. 1714(l)(1).

### 3. Classification and withdrawal review

a. The Department of the Interior had determined as early as the mid-1950's that some form of review of classifications and withdrawals was necessary. J.A. 141. Many withdrawals had become outdated, proposed projects had been abandoned, and in other cases the land character had changed. *Ibid.* In addition, many agencies for which a withdrawal had been made no longer needed it, or, in a few instances, the agency itself had ceased to exist. *Ibid.* And the enactment of FLPMA in 1976—with its broad delegation to the Secretary to review withdrawals and classifications—gave this review process an even higher priority in the agency.

The review process—particularly with respect to classifications (which affected by far the majority of the lands at issue in this case, see J.A. 164-165)—was detailed and complex, drawing on the technical skills of a wide range of planners and land-use experts. The Secretary examined each classification as part of a coordinated land use planning process, usually involving the development

of an MFP. In accordance with agency regulations, moreover, each MFP was accompanied by extensive public participation.<sup>4</sup>

b. The review of Classification W-6228—involving the land at issue in the Peterson affidavit—illustrates the process. At the outset, Classification W-6228 had segregated 2,077,702 acres of land in the Green Mountain/South Pass area from appropriation under agricultural land laws and from sales. J.A. 132. Of those approximately 2,000,000 acres, Classification W-6228 had segregated 6,379 acres from mining as well. *Ibid.* BLM began the process of preparing an MFP for the Green Mountain area in 1977 (J.A. 125); following a lengthy and complex process, resulting in a number of changes in the region's management, the agency terminated the classification against mining for about 4,500 acres in the region.

The first stage of the MFP involved preparation of a Unit Resource Analysis consisting of several parts: a base map indicating the boundaries of the planning unit and the status of each parcel of land within the unit; a detailed description of the geographic and environmental characteristics of the area, including analysis of all the natural resources within the area; analysis of the potential uses of each of the resources within the area; and an ecological profile to ascertain and describe any unique or fragile areas within the planning unit, to define the predominant land uses, and to identify all important management considerations.<sup>5</sup> J.A. 125-126. Next, BLM de-

<sup>4</sup> Withdrawal revocations, whether under Section 204(a) or Section 204(l) of FLPMA, are not subject to the land use planning process required by Section 202(c) for classification review. Compare 43 U.S.C. 1712(d) with 43 U.S.C. 1714(a). Post-FLPMA changes in withdrawal status were nonetheless effected in a manner consistent with existing land use plans and were subject to extensive public participation.

<sup>5</sup> The Unit Resource Analysis is contained in the record as Exhibit 1 to the Kelly Affidavit, which was attached to the federal defendant's Motion for Summary Judgment.

veloped resource objectives and recommendations. Each objective and planning recommendation was developed independently of the others, to ensure that the planners would be aware of the full potential of each resource.<sup>6</sup> J.A. 128. Finally, BLM performed a "planning area analysis," which provided an integrated account of the social, economic, resource, and environmental features of the area, and made tentative recommendations for resolution of any conflicts among the resource objectives and recommendations. J.A. 128-129, 133. The Green Mountain MFP was completed in 1981. J.A. 131.<sup>7</sup>

<sup>6</sup> That approach (known as "blinders-on") requires each resource specialist to make recommendations for use of the area as if no other resource existed. The wildlife specialist thus develops objectives and makes planning recommendations oriented solely to the maximum enhancement of wildlife habitat. The mineral and range management specialists do likewise for their respective resources. The purpose of the approach is to develop a set of proposals that reflect the optimum management possibility for each resource. The approach also ensures that when conflicts among resource objectives surface later in the planning process, the decisionmaker will be assured of having before him the full range of management options for each resource. And if no conflicts emerge, the approach ensures that resources can be managed at their optimum level. J.A. 128.

<sup>7</sup> At each of those stages, but particularly before the MFP became final, the public—at the federal, state, and local level—was informed about the process and invited to review the plans and proposals. In 1977 and 1978, while the Unit Resource Analysis was in preparation, BLM made approximately 80 contacts—ranging from telephone calls and personal interviews to group meetings and workshops—concerning the upcoming planning work for the area. J.A. 127. During each subsequent stage more contacts were made, including meetings with the Green Mountain Monitoring Group, ranchers, the Wyoming State Oil and Gas supervisors, and the Forest Service. J.A. 129. On July 30, 1979, BLM sent interested persons a letter enclosing a discussion and brief explanation of the MFP proposals. *Ibid.* At the public hearing held on August 22, 1979, a BLM official specifically discussed the proposed review of the areas segregated from mining by Classification W-6228. J.A. 129-130.

In late 1981, BLM proposed a series of land use decisions based on the MFP. J.A. 131. Among them was a decision to modify Classification W-6228. Like the review process overall, the modification of Classification W-6228 was the product of sustained, multi-factored analysis. At the "blinders-on" stage, see note 6, *supra*, the MFP had recommended that the mineral segregation established by Classification W-6228 be revoked entirely, because of the possibility of important gold and uranium deposits in the area. J.A. 133. A further, multiple-use analysis, however, disclosed that a wholesale termination of the existing classification would conflict with important recreational and historic uses of the land. J.A. 133-134. Accordingly, in September 1982, BLM decided to terminate the mineral segregation on approximately 5,120 of the 6,379 acres originally segregated by W-6228. J.A. 135. BLM retained the segregation on 959 acres in South Pass to protect wildlife values, on 120 acres in the Green Mountain area to protect significant recreational sites, on 80 acres in the Castle Gardens area to protect an important archaeological site, and on 100 acres in Beaver Rim to protect a proposed "Area of Critical Environmental Concern." *Ibid.* Pursuant to Section 202(d) of FLPMA, 43 U.S.C. 1712(d), BLM determined that those decisions were consistent with existing land use plans. J.A. 135-136.

Thereafter, the Wyoming State Game and Fish Department raised new concerns about a possible impact on moose habitat. In response, BLM revised its determination (J.A. 136-137), and elected to retain the segregation on an additional 768 acres. On May 10, 1984, BLM published in the *Federal Register* its final decision, terminating the mineral segregation as to 4,455 acres and retaining it on 1,913 acres. 49 Fed. Reg. 19,904-19,905.<sup>8</sup>

<sup>8</sup> BLM has continued to reevaluate those decisions in the context of ongoing land use planning. In January 1984, BLM initiated a Resource Management Plan for the entire Lander Resource area, encompassing Green Mountain and South Pass. 49 Fed. Reg. 3,277-

c. By 1986, BLM had terminated classifications on close to 160,000,000 acres. J.A. 164. Pursuant to Section 204(a) of FLPMA, moreover, BLM had also revoked withdrawals covering some 19,000,000 acres. J.A. 144.<sup>9</sup> Each of those approximately 1,250 orders was tailored to the unique circumstances of the particular land and other resources involved. For example, three classification orders on 1,418 acres in the State of Washington were terminated because the orders had classified the lands for sale under the Small Tract Act, which FLPMA had repealed. J.A. 167. At the other end of the scale, 25 classification orders on almost 23 million acres in Utah were revoked because the lands had been classified for "multiple use management and segregated from appropriation under the agricultural entry laws \* \* \*" (J.A. 168); because FLPMA had repealed the agricultural entry laws and mandated multiple use management, those classifications had become moot. J.A. 169. BLM also revoked withdrawals that had segregated 1.7 million acres for the use of federal agencies that no longer needed the land. J.A. 142-143, 145. Those included relinquishments from the Coast Guard of 11 acres reserved for lighthouse purposes, as well as thousands of acres from the Army for lands no longer needed for weapons testing purposes. J.A. 146-148. And with respect to an additional 4.8 million acres, BLM revoked withdrawals for "record clearing" purposes.<sup>10</sup> J.A. 143-144, 145.

3,278. In 1985, the agency prepared a draft RMP/environmental impact statement in which it discussed several options concerning the status of the area. J.A. 138. The Lander RMP—and all of the issues it raises—continue to be the subject of public meetings, hearings, and open houses. J.A. 138-139.

<sup>9</sup> BLM has undertaken all of its withdrawal revocations to date pursuant to Section 204(a) of FLPMA. No revocations pursuant to Section 204(l) of the Act have yet been completed.

<sup>10</sup> The "record" required "clearing" in three principal respects. First, some of the lands subject to withdrawal had previously been

### B. The Present Controversy

1. a. On July 15, 1985, respondent National Wildlife Federation (hereinafter "respondent") filed the present action, charging that BLM had undertaken a massive program to lift "protective" restrictions on federal lands, in violation of the provisions of FLPMA, the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* Representative Seiberling (who has since retired from the House) intervened in support of respondent, and Mountain States Legal Foundation (MSLF) intervened in support of petitioners.

As subsequently amended, respondent's complaint alleged that the Federation and its members "are suffering and will continue to suffer injury in fact as a result of the challenged actions." J.A. 12. In particular, the complaint continued, the Federation's members "use and enjoy the environmental resources that will be adversely affected by the challenged actions." *Ibid.* The complaint did not, however, identify the "adversely affected" resources, other than by appending a list of 814 notices of "land status actions" published in the *Federal Register* between January 1, 1981 and the date of the complaint. J.A. 25-50. Even that list, the complaint asserted, was "not intended to be inclusive." J.A. 15.

With those allegations of standing as a predicate, respondent asserted three principal causes of action. First, respondent claimed that petitioners violated FLPMA by failing to prepare RMPs in connection with their classification terminations (covering about 160 million acres)

transferred out of federal ownership. Second, there were numerous instances of overlapping withdrawals, which rendered one or more of the withdrawals unnecessary. Third, some of the withdrawals had been superseded by Congress; for example, Congress created a national park on an area covered by a withdrawal. In each of those cases, a revocation of the existing withdrawal was required in order to reconcile the public land records with the current status of the land. J.A. 143-144.

(Count I). Second, the complaint alleged that petitioners violated Section 204(l) of FLPMA when they revoked certain withdrawals (affecting about 20 million acres) in 11 western States without first submitting a review recommendation to the President or the Congress (Count II). Third, respondent asserted that petitioners violated FLPMA by failing to provide an opportunity for public participation in the "land use status" decisions (Count VII). J.A. 15-17, 20-21.

b. On December 4, 1985, the district court denied petitioners' motion to dismiss for failure to join indispensable parties and granted respondent's request for a preliminary injunction (Pet. App. 119a-136a). On a motion for reconsideration, the court also rejected MSLF's contention that respondent had not adequately alleged injury in fact from petitioners' actions (*id.* at 137a-150a). The court issued a nationwide preliminary injunction, enjoining the government from "[t]aking any action inconsistent with any withdrawal, classification, or other designation governing the protection of lands in the public domain that was in effect on January 1, 1981" (*id.* at 185a), thereby freezing the status quo as of that date for at least 180 million acres—an area equal to about one-thirteenth of the land mass of all fifty States.

The injunction had sweeping implications. In addition to halting more than 260 agricultural entries, the injunction froze hundreds of land transactions, including a land exchange between the Bureau and the State of Arizona under which the federal government would have obtained 500,000 acres of state land scattered throughout wilderness study areas and desert bighorn sheep and riparian wildlife habitat areas, in exchange for 150,000 acres of federal land (Martyak Affidavit at 6-7; C.A. App. 203-204); revocation of a land withdrawal that otherwise would have permitted the construction of a power-generation dam in the Grand Canyon Recreation Area (Bibles Affidavit and attached videotape); and

pending or proposed sales of BLM lands near Las Vegas, Nevada, to generate money to permit the Forest Service to purchase environmentally sensitive land in the Lake Tahoe Basin. See Collins Declaration at 1; C.A. App. 227.<sup>11</sup>

Because of the extraordinary scope of the preliminary injunction, the district court received numerous requests for exemptions during the next several months. The court soon found it necessary to modify the preliminary injunction, ruling, in an order of February 10, 1986, that the injunction did not directly enjoin the activities of third parties (although the practical effect of the revised injunction was to prohibit third-party activities on these lands in the many cases in which the transaction had not been completed). Pet. App. 145a. Thereafter, in response to federal legislation enacted to revise the court's injunction, the court approved additional amendments to its injunctive order. See, e.g., Order of Nov. 25, 1986 (Pet. App. 169a); Order of Apr. 8, 1988 (Pet. App. 160a-161a); Act of Oct. 27, 1986, Pub. L. No. 99-542, § 3, 100 Stat. 3038-3039; Wild and Scenic Rivers Act, Amendments, Pub. L. No. 99-590, § 104, 100 Stat. 3332; Act of Nov. 7, 1986, Pub. L. No. 99-632, §§ 4, 6-7, 100 Stat. 3520, 3521; Act of Nov. 6, 1986, Pub. L. No. 99-606, § 12(h), 100 Stat. 3467; Federal Land Exchange Facilitation Act of 1988, Pub. L. No. 100-409, § 10, 102 Stat. 1092-1093.<sup>12</sup> Indeed, in one instance, respondent itself sought an exemption from the injunction for a land exchange that all viewed as en-

<sup>11</sup> Congress specifically authorized these transactions in the Burton-Santini Act. Burton-Santini Act, Pub. L. No. 96-586, 94 Stat. 3381 (1980).

<sup>12</sup> On the other hand, when the Trust for Public Land—another environmental organization—sought to intervene in order to petition the district court to exempt from the injunction a land exchange that would have added 371 acres to various wilderness and forest lands, the district court granted intervention but refused to permit the exemption. Order of Mar. 6, 1986 (Pet. App. 176a-177a).

vironmentally beneficial. The court denied that request, without explanation (Order of Apr. 30, 1986, entered May 5, 1986 (Pet. App. 174a-175a)).<sup>13</sup>

c. In May 1986, more than five months after the district court issued its injunction, respondent submitted three affidavits of members to support its standing to challenge the hundreds of land use orders affecting the approximately 180,000,000 acres of public land. The affidavit of Peggy Kay Peterson stated (Pet. App. 191a):

My recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of South Pass-Green Mountain, Wyoming have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department. In particular, the South Pass-Green Mountain area of Wyoming has been opened up to the staking of mining claims and oil and gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands.

The affidavit of Richard Loren Erman was virtually identical to the Peterson affidavit, except that it alleged that Erman uses land "in the vicinity of Grand Canyon National Park, the Arizona Strip (Kanab Plateau) and the Kaibab National Forest" (Pet. App. 187a). That

<sup>13</sup> Similarly, in August 1986, the Department of Water and Power for the City of Los Angeles, the California Energy Company, Inc., and the County of Inyo, California, sought to intervene in the action to seek exemptions from the preliminary injunction "for the limited purpose of obtaining a declaration that Cal Energy's geothermal operations on Naval Weapons Center lands \* \* \* in the Coso Known Geothermal Resource Area, Inyo, California, are not within the scope of [the injunction]" or for an exemption for those operations. Motions to Intervene, Docket Nos. 188-190. The district court ultimately issued an order interpreting its injunction to exclude those operations, but denying a request to declare that a congressionally approved exchange of the land on which those operations are conducted is not within the scope of the injunction. Orders of Jan. 6, 1987, and Dec. 31, 1986 (Pet. App. 165a-168a).

area, called the Arizona Strip, contains 5.5 million acres, one-eighth of the State of Arizona. Erman claimed injury from potential uranium mining in that area allegedly made possible by Interior's action.

Finally, in support of its claim of "informational standing," respondent submitted a declaration of a vice-president of the organization, Lynn Greenwalt. The Greenwalt declaration alleged injury to the group's ability to acquire and disseminate information on the public lands. Pet. App. 193a-194a.

2. a. The government and MSLF appealed, and a panel of the court of appeals affirmed by a divided vote (Pet. App. 38a-115a). In upholding the preliminary injunction, the court concluded that respondent had "alleged injury in fact sufficient to establish standing to pursue its two FLPMA claims [Counts I and VII] against the Department." *Id.* at 56a. The court noted that respondent had alleged that its members regularly use the lands at issue (*id.* at 51a-52a), and it rejected the contention that those allegations were insufficiently specific. In any event, the court stated (*id.* at 53a-54a):

Even if this lack of specificity were somehow fatal to the complaint, it was cured by the affidavits of two Federation members filed with the district court after issuance of the preliminary injunction. \* \* \* These affidavits provide a concrete indication that the Federation's members use specific lands covered by the agency's Program and will be adversely affected by the agency's action. Mountain States contends that even these affidavits are insufficient because the named members claim only to use resources in the "vicinity" of the land covered by the challenged withdrawal revocations. The Federation's allegations in this regard however comport with those in [*United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973)]; they therefore are suf-

ficiently specific for purposes of a motion to dismiss. [<sup>14</sup>]

Judge Williams concurred in the judgment on the standing issue, but wrote separately "in the hopes of clarifying what a plaintiff must show to meet the injury-in-fact component of standing when seeking a preliminary injunction" (Pet. App. 85a-86a). He stated that "NWF challenges the legality of two programs—classification terminations and withdrawal revocations—that affect over 180 million acres of public lands" (*id.* at 86a). He reasoned that standing principles require that respondent (*ibid.*):

(1) identify lands that are affected by each program; (2) demonstrate that third parties are likely to respond to the regulatory changes with development activities; and (3) identify activities of members in specific areas that would suffer an adverse impact from such third-party conduct.

Judge Williams concluded that while respondent had adequately identified the land at issue, "[a]s to the other elements, NWF's submissions were markedly defective" (*id.* at 89a). In particular, he explained, the allegations in the complaint were "too vague," as were the assertions contained in respondent's affidavits (*ibid.*). He nevertheless concluded that the record "provides modest support for the inference that some types of the disputed regulatory status changes have a material likelihood of leading to development activity potentially injurious to the activities of plaintiff's members on the lands named in the affidavits" (*id.* at 90a).<sup>15</sup>

<sup>14</sup> The court also held that respondent had not failed to join indispensable third parties or exhaust its administrative remedies, and that the complaint was not barred by laches. Pet. App. 57a-65a.

<sup>15</sup> Judge Williams dissented from the court's affirmance of the preliminary injunction, concluding that respondent was not likely to prevail on the merits, that it had failed to show a sufficient threat

b. The government and MSLF thereafter filed petitions for rehearing, and the panel denied the petitions in a per curiam memorandum. Pet. App. 116a-118a. In doing so, however, the court recognized that "some of the criticisms of the breadth and scope of the preliminary injunction offered in the vigorous dissent are not without force" (*id.* at 117a-118a). It also acknowledged that "the disposition of these millions of acres should not continue to rest any longer than necessary on the foundation of a preliminary injunction which was entered on consideration of the brief affidavits and cursory materials presented to the court below" (*id.* at 118a). The court therefore "issue[d] its mandate forthwith with directions to the parties and the district court to proceed with this litigation with dispatch" (*ibid.*).

3. a. In June 1986, prior to the court of appeals' decision remanding the case, the government had served 16 notices of deposition to discover the basis of respondent's allegations of standing. The following month, respondent filed a motion for summary judgment. It also moved, successfully, to preclude the government's request for discovery on the standing issue, asserting that any such discovery "would be unreasonably cumulative, duplicative, burdensome and expensive" (Motion to Quash and for a Protective Order at 7; Pet. App. 170a).

In support of a cross-motion for summary judgment, filed in September 1986, the government submitted extensive affidavits addressed to the question of standing. For its part, respondent continued to base its standing on the Peterson, Erman, and Greenwalt affidavits, filing no additional affidavits within the time allotted under Fed. R. Civ. P. 56. At the close of a hearing on the motion in July 1988, the district court requested supplemental briefing on the question of NWF's standing. In response to that request, respondent submitted not only a legal

of irreparable harm, and that the potential threat of harm to other parties and to the public interest weighed against the issuance of an injunction. Pet. App. 99a-115a.

memorandum, but also four new factual affidavits. The district court refused to consider those affidavits, finding that they were "untimely and in violation of our Order" (Pet. App. 28a-29a n.3).

b. On November 4, 1988, the district court vacated the outstanding preliminary injunction, granted the government's motion for summary judgment, and dismissed the action for want of standing (Pet. App. 26a-37a). The court explained that to establish its standing, respondent was required to "plead and prove that it or its members have suffered some actual or threatened injury as the result of defendants' allegedly unlawful conduct" (*id.* at 31a). The court found that respondent had failed to meet that burden.<sup>16</sup>

The court first examined respondent's claim that the government had not permitted sufficient public participation in its review process. On that claim, the court noted, respondent based its standing on the Greenwalt declaration, which simply stated that the Federation's ability to meet its obligation to its members "has been significantly impaired by the failure of the Bureau of Land Management and the Department of the Interior to provide adequate information and public participation with respect to the Land Withdrawal Review Program" (Pet. App. 32a). The court found that statement "conclusory and completely devoid of specific facts" (*ibid.*), holding that it provided "no basis to support [respondent's] claim of standing" (*ibid.*).<sup>17</sup>

<sup>16</sup> The court noted that the previous rulings concerning standing "arose in the posture of defendant's motion to dismiss, which affected the degree of factual specificity required to be shown in order to establish the likelihood of personal injury to plaintiff's members" (Pet. App. 29a). On a motion for summary judgment, it explained, a court is entitled to reconsider a preliminary determination of standing (*id.* at 30a).

<sup>17</sup> The court also noted that "[a]lthough not required to do so, because defendants did not have the burden to disprove plaintiff's conclusory contention, defendants have advised plaintiff of the environmental documentation and the methodology employed and have

The court turned next to respondent's claim of standing based on alleged environmental harm to its members resulting from the termination of classifications and the revocation of withdrawals. The court observed that respondent "rest[ed] its entire claim of standing to sue for environmental injury on the affidavits of two persons, *i.e.*, Peggy Peterson and Richard Erman" (Pet. App. 34a), which "use the same boiler plate language and format" (*id.* at 34a n.10). Peterson's affidavit, the court stated, simply "claims that she uses federal lands in the vicinity of the South Pass-Green Mountain area of Wyoming for recreational purposes and for aesthetic enjoyment" and that her enjoyment has been "adversely affected as the result of the decision of the BLM to open it to the staking of mining claims and oil and gas leasing" (*id.* at 34a-35a). Based on the government's affidavits, however, the court noted that 1,993,500 acres of the 2,000,000-acre South Pass-Green Mountain area (about 99.67%) had always been open to mining and mineral leasing and that petitioners' termination of the relevant classification opened up only an additional 4,500 acres (.225%) of that area. See *id.* at 35a. The court observed that Peterson's affidavit, which simply asserted that "she uses lands 'in the vicinity'" of the 2,000,000-acre area, failed to establish that her use "extend[ed] to the particular 4,500 acres affected by the termination" (*ibid.*).

The court concluded that the Erman affidavit was "similarly flawed." Pet. App. 35a. Erman, the court noted, asserted that he used federal lands "in the vicinity" of the Grand Canyon National Park and the Arizona Strip and that his enjoyment would be adversely affected by the BLM's actions, "with particular reference to the opening to the staking of mining claims" in that 5.5 million acre area, "an area one-eighth the size of the State of Arizona" (*id.* at 35a-36a). The government's

made its [*sic*] extensive files containing such information available for plaintiff's inspection" (Pet. App. 32a n.8).

affidavits showed, however, that "virtually the entire Strip is and for many years has been open to uranium and other metalliferous mining" (*id.* at 36a), and that the "revocation of withdrawal concerned only non-metalliferous mining in the western one-third of the Arizona Strip, an area possessing no potential for non-metalliferous mining" (*ibid.*). The court concluded (*id.* at 36a-37a):

Both the Peterson and Erman Affidavits are vague, conclusory and lack factual specificity. They do not and cannot show "injury in fact" with respect to the two specific areas in Wyoming and Arizona in the vicinity of which these affiants claim to be located. More important, standing alone, these two affidavits do not provide any basis for standing to challenge, as violative of the Federal Land Policy Management Act, the legality of each of the 1250 or so individual classification terminations and withdrawal revocations. It should be noted that plaintiff's claims of injury reach hundreds of decisions affecting 180 million acres spread over seventeen states. Since plaintiff lacks standing in the constitutional sense or as an "aggrieved party" under Section 702 of the APA, we lack subject matter jurisdiction and dismiss for lack of standing. [<sup>18</sup>]

4. The court of appeals reversed (Pet. App. 1a-25a). The court first ruled that the Peterson affidavit, by itself, sufficiently established "injury-in-fact" to withstand summary judgment under the APA and the Constitution (*id.* at 15a-16a). The court acknowledged that the affidavit did not state that Peterson had used the 4,500 acres in South Pass-Green Mountain that were actually opened to mining and mineral leasing (*id.* at 16a-17a). It reasoned, however, that (*id.* at 17a):

<sup>18</sup> In light of its standing decision, the district court found it unnecessary to reach "the merits of plaintiff's claim for injunctive relief" (Pet. App. 37a). It noted, however, that Judge Williams' dissenting opinion "mirrored many of the[] problems in its discussion of our grant of preliminary injunction" (*ibid.*).

The language of Peterson's affidavit can be read to *presume* that the 4500 newly opened acres included the areas that Peterson uses; otherwise her use and enjoyment would not be "adversely affected." \* \* \* If Peterson was not referring to lands in this 4500-acre affected area, her allegation of impairment to her use and enjoyment would be meaningless, or perjurious. The District Court in no way questions the *veracity* or *clarity* of the affidavit, only its *specificity*. \* \* \* But the trial court overlooks the fact that unless Peterson's language is read to refer to the lands affected by the Program, the affidavit is, at best, a meaningless document.

The court added that, "[a]t a minimum," the affidavit is ambiguous, and thus, on summary judgment, the district court should have resolved that ambiguity in favor of the non-moving party, in this case the respondent. *Ibid.*<sup>19</sup>

The court of appeals also held that the law of the case doctrine required a ruling on the standing question in respondent's favor. Pet. App. 18a-20a. The court noted that in affirming the preliminary injunction issued by the district court, a previous panel had rejected a challenge to respondent's standing. *Id.* at 18a-19a. The court reasoned that since "the burden of establishing irreparable harm to support a request for a *preliminary injunction* is, if anything, *at least as great* as the burden of resisting a *summary judgment motion*" (*id.* at 20a), the prior decision "upholding [respondent's] standing is therefore the law of the case, which disposes of this appeal" (*ibid.*).

Finally, the court found it "unfair and an abuse of discretion for the trial court to refuse to consider the affidavits submitted by NWF when the court asked for

<sup>19</sup> The court noted that since it found the Peterson affidavit sufficient to survive summary judgment, it did not need to address the sufficiency of the Greenwalt and Erman affidavits. Pet. App. 18a n.13.

supplemental memoranda on the standing issue" (Pet. App. 21a). The court surmised that "[n]o party to this litigation seriously disputes that NWF's supplemental affidavits, if considered, easily satisfy the level of specificity needed for standing under any of the Supreme Court's articulated tests" (*ibid.*). In a footnote, the court further held that, having established its standing to challenge one particular land action, respondent therefore had standing to challenge all of the hundreds of different land actions involved in the case. *Id.* at 16a n.12.

Having rejected petitioners' summary judgment challenge to respondent's standing, the court directed the trial court, on remand, to "address NWF's claims on the merits and fashion whatever relief it deems appropriate" (Pet. App. 24a). It "decline[d], however, to reinstate the preliminary injunction because the case should now proceed with dispatch" (*id.* at 25a).

## INTRODUCTION AND SUMMARY OF ARGUMENT

The decision of the court of appeals expands the standing doctrine beyond meaningful limitation. Departing from the already generous standards articulated in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), and *Sierra Club v. Morton*, 405 U.S. 727 (1972), the court below accepted a single, vague allegation—one member's use of land "in the vicinity of" a 2,000,000-acre area—as a sufficient basis for challenging hundreds of separate land use and disposition decisions affecting some 180,000,000 acres of public land. To do so, the court was constrained to "presume" that the affiant intended to assert an interest in the 4,500 affected acres scattered within the 2,000,000-acre area—although the affiant had never adverted to those lands, let alone asserted a personal interest in them.

The court's misapplication of standing principles would permit respondent, and similar plaintiffs in the future, to petition federal courts for far-reaching relief

from injuries that they have not shown any likelihood of suffering. The decision would thus threaten to draw the courts into disputes that lack "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult \* \* \* questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). And once drawn so comprehensively into the fray, the courts would inevitably assume (as exemplified by the nationwide preliminary injunction here) managerial responsibilities for wide-ranging federal activities—activities whose administration properly belongs in the Executive Branch.

I. To secure standing to sue, a party must allege and, if challenged, prove that he has suffered a "distinct and palpable" injury as a result of the challenged governmental action. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). That showing, moreover, "cannot be 'inferred argumentatively from averments in the pleadings,' \* \* \* but rather 'must affirmatively appear in the record.'" *FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 608 (1990). The Peterson affidavit satisfies neither those prerequisites. Peterson's allegation of injury, involving use of land "in the vicinity" of a 2,000,000-acre parcel, is too remote from the particular 4,500 scattered acres actually affected by the challenged land use action. Still more remote—indeed, non-existent—is any showing of Peterson's connection to the 178,000,000 remaining acres, outside the Green Mountain/South Pass region.

The court of appeals' effort to resuscitate Peterson's affidavit—by "presuming" that she had in mind the particular 4,500 affected acres—is fundamentally flawed. At bottom, the court's approach imputes to Peterson assertions that she did not, and perhaps could not, make on her own. The court of appeals had no warrant for presuming facts never proved. As this Court has recently reiterated, "it is the burden of the 'party who

seeks the exercise of jurisdiction in his favor' \* \* \* 'clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'" *FW/PBS, Inc.*, 110 S. Ct. at 608. And respondent was never required to prove, when challenged, the facts establishing its standing.

II. In granting summary judgment in this case, the district court resolved two other issues in the government's favor. First, the court refused to permit respondent to supplement the record by submitting new factual affidavits after the close of the summary judgment hearing (see Pet. App. 28a-29a n.3). Second, the court found that the Greenwalt affidavit, submitted in support of respondent's "informational standing" claim, was legally insufficient, in that it was "conclusory and completely devoid of specific facts" (*id.* at 32a). The district court resolved both issues correctly.

A. Although it had repeated opportunities over nearly two years to supplement the factual record, respondent rested steadfastly on the Peterson, Erman, and Greenwalt affidavits. Indeed, respondent resisted the government's effort to secure discovery on the standing issue, contending that further inquiry "would be unreasonably cumulative, duplicative, burdensome and expensive" (Motion to Quash and for a Protective Order at 7; Pet. App. 170a). Even after the government filed its summary judgment motion on standing grounds, respondent submitted no additional evidence to the court. Only after the conclusion of the hearing on summary judgment, when the district court asked for additional legal memoranda, did respondent change its tune. Along with the requested memorandum, respondent submitted new affidavits, but offered no excuse for the tardy submission. Under those circumstances, the trial court acted wholly within its discretion in rejecting the offerings.

B. The district court was also correct in finding the Greenwalt declaration legally insufficient. That declaration—submitted in support of respondent's "informa-

tional standing" claim—asserted simply that respondent's ability to pursue its programs had been "significantly impaired by the failure of the Bureau of Land Management and the Department of the Interior to provide adequate information and opportunities for public participation with respect to the Land Withdrawal Review Program" (Pet. App. 194a). The declaration did not identify particular information that respondent had been denied. Indeed, the declaration did not allege that respondent had even *sought* particular information, or had attempted without success to participate in the decision-making process that culminated in the challenged decisions. In the absence of such allegations, the Greenwalt declaration was insufficient to confer standing to sue.

In sum, having correctly concluded that respondent had wholly failed to establish its standing to sue, the district court properly granted summary judgment in favor of petitioners.

## ARGUMENT

### I. THE ALLEGATIONS CONTAINED IN THE PETERSON AFFIDAVIT ARE INSUFFICIENT TO CONFER STANDING ON RESPONDENT TO SUE

#### A. To Secure Standing To Sue, A Plaintiff Must Clearly Allege A Distinct and Palpable Injury Resulting From The Challenged Action

1. Article III of the Constitution limits the judicial power to "Cases [and] Controversies[.]" To establish standing under Article III, a plaintiff must allege a personal injury that is fairly traceable to the defendant's challenged conduct and that is likely to be redressed by the relief sought. *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). The injury cannot be an "abstract" or "hypothetical" one (*O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-

102 (1983)); it must be "distinct and palpable" (*Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)). And the claimed injury must ordinarily affect the party himself, not someone else: "the party who invokes the court's authority" must "show that he *personally* has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian College*, 454 U.S. at 472 (emphasis added). Only by identifying a concrete injury-in-fact can a plaintiff "'allege[] such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

The Administrative Procedure Act, 5 U.S.C. 702, under which this suit was filed, complements Article III standing by limiting challenges to parties who are "adversely affected or aggrieved" by a governmental action. Under Section 702, the Court has required plaintiffs to show that they are personally injured and that their injury is caused by the challenged action. See, e.g., *Valley Forge Christian College*, 454 U.S. at 472, 487-488 n.24; *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38-39 (1976); *Sierra Club v. Morton*, 405 U.S. 727, 732-733 & n.3 (1972).<sup>20</sup>

To be sure, the Court's decisions in *Sierra Club v. Morton*, 405 U.S. 727 (1972), and *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), on which the court of appeals relied (Pet. App. 14a-15a, 17a), took a somewhat

<sup>20</sup> Section 702 also requires plaintiffs to show that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 395-396 (1987) (quoting *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

expansive view of standing. But in both cases the Court nonetheless insisted upon a clear showing of direct and personal injury. Thus, in *Sierra Club*, the Court held that the mere assertion that the Club had "a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country" was not enough to confer standing. 405 U.S. at 730. Because the Sierra Club had failed to allege any individualized interest in the specific lands in dispute, the Court rejected its standing claim. *Id.* at 734-735. Similarly, in the *SCRAP* case, in which the Court upheld the plaintiffs' standing, the Court emphasized that the plaintiffs had specifically claimed that their members "used the forests, streams, mountains, and other resources in the Washington metropolitan area" (412 U.S. at 685)—resources which, according to the allegations in the complaint, would be "directly harm[ed]" by the challenged government action (*id.* at 687). The Court explained that the plaintiffs had thereby "alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected" (*id.* at 689).

2. At the summary judgment stage of a litigation, a plaintiff may not rest on mere allegations, but must furnish sufficient proof of the injuries attributable to the defendant's actions. "For purposes of ruling on a motion to dismiss for want of standing," the Court has explained, "both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Accord *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988). Thereafter, however, the party invoking the court's jurisdiction may be required to furnish "by affidavits, further particularized allegations of fact deemed supportive of [its] standing." *Warth*, 422 U.S. at 501. At that point, "the allegations must be true and capable of proof at trial." *SCRAP*, 412 U.S. at 689. And if, having supple-

mented its pleadings with affidavits and further proof, "the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." *Warth*, 422 U.S. at 502.

It is not sufficient, therefore, for a party simply to suggest a distinct and palpable injury—it must, instead, demonstrate that injury *clearly*, and do so on the face of the record. "It is a long-settled principle that standing cannot be 'inferred argumentatively from averments in the pleadings,' \* \* \* but rather 'must affirmatively appear in the record.'" *FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 608 (1990). Accord *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546 & n.8 (1986).

This Court's recent decision in *FW/PBS, Inc.*, illustrates the specificity with which a party must establish its standing to sue. Plaintiffs in that case sought to enjoin the enforcement of a city ordinance regulating the issuance of licenses to operate "sexually oriented businesses." One of the provisions at issue denied licenses to persons who had been convicted of two or more enumerated misdemeanors within a 24-month period; that disability lasted for five years from the date of the last conviction or from release from confinement, whichever was later. Among the plaintiffs was Bill Staten, who alleged in his affidavit that he had been convicted of three enumerated misdemeanors within a 24-month period. Staten failed, however, "to state when he had been convicted of the last misdemeanor or the date of release from confinement" (110 S. Ct. at 609). Accordingly, the Court explained, Staten "failed 'clearly to allege facts demonstrating that he is a proper party' to challenge the civil disability provisions." *Ibid.* Because "[n]o other petitioners ha[d] alleged facts to establish standing and the District Court [had] made no factual findings that could support standing" (*ibid.*), the Court held that petitioners could not challenge the civil disability provisions of the ordinance. The Court certainly did not "presume" that Staten's last conviction or release from confinement fell

within the last five years, simply because he had alleged standing to challenge the ordinance.

**B. Under The Governing Standards, Respondent Cannot Predicate Standing To Sue On The Allegations Contained In The Peterson Affidavit**

1. Respondent has not made a sufficient showing of standing in the present case. The single affidavit on which the court of appeals relied—the Peterson affidavit—stated only that a single member uses land “in the vicinity of” a 2,000,000-acre area. That area, which is nearly three times larger than the State of Rhode Island, contains, scattered within it, no more than 4,500 acres of land (.225% of the total) affected by the challenged land status actions in this case. Nothing in the Peterson affidavit suggests that the affiant has any connection with the affected lands—it states merely that she uses and enjoys land “in the vicinity of” the millions of acres that surround them. And “vicinity” could mean Fremont and Natrona Counties, Wyoming (generally the area embraced by Classification W-6228); or all of central Wyoming; or, for all we know, anywhere in “the West.” In short, unlike the plaintiffs in *SCRAP*, respondent has not shown “a specific and perceptible harm that distinguishes [it] from other citizens who have not used the natural resources that were claimed to be affected” (412 U.S. at 689).

In granting summary judgment on the record before it, the district court correctly concluded that respondent’s proof of standing was “vague, conclusory, and lack[ing] [in] factual specificity.” Pet. App. 36a.<sup>21</sup> The court of appeals held otherwise only by “presum[ing]” language that the affidavit simply does not contain. In the court’s

<sup>21</sup> See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (“the plain language of Rule 56(c) mandates the entry of summary judgment \* \* \* against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case”).

view, “[t]he language of Peterson’s affidavit can be read to *presume* that the 4500 newly opened acres included the areas that Peterson uses; otherwise, *her* use and enjoyment would not be ‘adversely affected.’” *Id.* at 17a. But the court’s reasoning is exactly backwards; it “*presume[d]*” the requisite showing of standing because, had it not done so, respondent’s standing claim “would be meaningless, or perjurious” (*ibid.*).

The court’s presumption—that a mere claim of standing necessarily implies a factual basis to support it—wholly nullifies the standing requirement. It is precisely because Peterson did *not* demonstrate any use of, or other interest in, the affected land that respondent lacks standing to challenge the government’s actions. The court below had no warrant for imputing to the affiant statements that she did not—and perhaps could not—make on her own.

This Court’s cases do not countenance the use of free-floating presumptions to do the work that parties have not done for themselves. To the contrary, as the Court explained most recently, the “facts supporting Article III jurisdiction must ‘appea[r] affirmatively from the record.’” *FW/PBS, Inc.*, 110 S. Ct. at 608. The Court’s decision in *Grace v. American Central Insurance Co.*, 109 U.S. 278 (1883), illustrates that point in a closely related setting. The defendant in *Grace*, having been sued on an insurance contract, removed the case to federal court. In its removal petition, the defendant alleged that plaintiffs resided and were doing business in New York; the record did not, however, expressly show whether plaintiffs were citizens of New York, and the Court therefore reversed the judgment for want of diversity jurisdiction. In doing so, the Court acknowledged that the defendant’s removal petition had *asserted* “that there is, and was at the time when this action was brought, a controversy therein between citizens of different States.” *Id.* at 284. But that assertion, the Court held, was nothing more than an “unauthorized conclusion of law which the petitioner

[drew] from the facts previously averred." *Ibid.* The Court refused to draw the same inference in the absence of an explicit showing. Because the jurisdiction of a federal court is limited, the Court explained, "the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears." *Id.* at 283. The requisite showing of jurisdiction, the Court stated, may not simply "be inferred argumentatively from averments in the pleadings." *Id.* at 284. Rather, the Court observed, "the averments should be positive." *Ibid.*<sup>22</sup>

The statements in the Peterson affidavit were anything but "positive." Like the defendant in *Grace*, Peterson alleged that she possessed a sufficient Article III interest, but she did not support that allegation with evidence "distinctly and positively averred in the pleadings" (109 U.S. at 284). The court of appeals was therefore left to "infer[]" Peterson's standing "argumentatively from averments in the pleadings" (*ibid.*). Unhappily, the court below embarked upon just that task—"presuming" the missing statements of fact, and thereby drawing the same "unauthorized conclusion of law" (*ibid.*) renounced by the Court in *Grace*.<sup>23</sup>

The federal courts are not commissioned to do that much work for the parties. Under Article III, "it is the burden of the 'party who seeks the exercise of jurisdiction in his favor' \* \* \* clearly" to demonstrate "that he is a

<sup>22</sup> Accord *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546-547 (1986); *Thomas v. Board of Trustees*, 195 U.S. 207, 210 (1904); *Mansfield, C.&L.M. Ry. v. Swan*, 111 U.S. 379, 382 (1884).

<sup>23</sup> The court of appeals alternatively surmised that the Peterson affidavit was, at worst, ambiguous, thereby preventing entry of summary judgment. Pet. App. 17a. That conclusion was also wrong. Ambiguity, without more, is not grounds for resisting summary judgment. To the contrary, under Fed. R. Civ. P. 56(e), it is up to the non-moving party to "set forth specific facts showing there is a genuine issue for trial." See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Respondent had ample opportunity prior to the hearing to meet that burden, but failed to do so.

proper party to invoke judicial resolution of the dispute." *FW/PBS, Inc.*, 110 S. Ct. at 608. Peterson did not carry that burden, and the court of appeals was not entitled to shoulder the burden for her.<sup>24</sup>

2. Having "presumed" Peterson's connection to the 2,000,000-acre parcel in Green Mountain/South Pass, the court of appeals then compounded its error, many times over. The court held (Pet. App. 16a n.12) that respondent has standing to challenge actions affecting not only the 2,000,000-acre parcel identified in the affidavit, but also the remaining 178,000,000 acres of public lands whose status is in dispute.

Traditional standing principles cannot accommodate that judgment. Peterson claimed only a remote connection to the 4,500 affected acres in the Green Mountain/South Pass region, and her affidavit provides nothing further to connect her (or the organization representing her)

<sup>24</sup> Any number of this Court's cases could have been decided differently if the plaintiffs in those cases had had at their disposal the court of appeals' presumption. In *FW/PBS, Inc.*, *supra*, for example, plaintiff Bill Staten asserted in his affidavit that because of his three misdemeanor convictions within a 24-month period, he had a "serious doubt that [he] would be able to obtain the requisite licenses" (7 Record, Staten Affidavit at 2). Following the approach of the court below, Staten could have argued that, because he had alleged a "serious doubt" about his licensing prospects, a court must "presume" that Staten's last conviction (or release from confinement) occurred within the last five years. A similar device might have availed the plaintiffs in *Warth v. Seldin*, *supra*, involving a challenge to local zoning practices that allegedly deprived the plaintiffs of affordable housing. With the benefit of the court of appeals' presumption, a court could have "presumed" from plaintiffs' basic allegation—that the zoning practices had excluded plaintiffs from the housing market (see 422 U.S. at 503-504 & nn.13, 14)—the very facts that this Court found to be missing from the pleadings: "facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease" a home (*id.* at 504). In short, taken to the limits of its logic, the court of appeals' "presumption" could transfigure established standing doctrine, root and branch.

to the remainder of the public land at issue. Indeed, a nexus is not even alleged, let alone substantiated. Accordingly, Peterson's stake in that remaining land "amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80 (1978). And as the Court explained in *Ex parte Levitt*, 302 U.S. 633, 634 (1937), "[i]t is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action \* \* \* it is not sufficient that he has merely a general interest common to all members of the public." Accord *Warth*, 422 U.S. at 499; *Schlesinger v. Reservists Committee To Stop The War*, 418 U.S. 208, 220 (1974).<sup>25</sup>

This extraordinarily far-reaching litigation—which has already produced a sweeping, nationwide preliminary injunction—has thus been premised on nothing more than a simple allegation of use of land "in the vicinity" of Green Mountain/South Pass. Indeed, as we have noted (*supra*, p. 11), the terminations and revocations at issue in this case vary considerably—including such disparate orders as a relinquishment from the Coast Guard of 11 acres previously reserved for lighthouse purposes, and the abandonment by the Army of thousands of acres that were no longer needed for weapons testing. The sharply different circumstances of the hundreds of separate orders challenged by respondent suggest that this case would not be appropriate for associational standing (particularly, standing to assert challenges on a blunderbuss, wholesale basis), even if the supporting affidavits from three of respondent's members were not otherwise deficient. See *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

<sup>25</sup> The Peterson affidavit alleges no more "distinct and palpable" stake in the land outside Wyoming than was the stake alleged by the Sierra Club in Mineral King and Sequoia National Park. See *Sierra Club v. Morton*, 405 U.S. at 735.

On the basis of the modest claim contained in her affidavit, Peterson was "presumed" to use the 4,500 affected acres scattered within the 2,000,000 acres that make up the region. And with that toehold interest alone, Peterson was then permitted to challenge (through respondent) a broad category of governmental decisions affecting an additional 178,000,000 acres of land throughout the Nation. Even if not itself flawed, the court of appeals' initial presumption would not justify so far-reaching an exercise of judicial power. A federal court, in resolving a dispute properly before it, may, of course, articulate a ratio decidendi that would have precedential implications for similar disputes. But it must be content to allow a subsequent court, before which a similar dispute arises, to determine whether it finds that precedent persuasive. It is not consistent with the judicial role under Article III for the initial court to seek to pretermitt the future resolution of similar disputes by expanding the standing of the parties before it to reach beyond the particular interests they have shown.<sup>26</sup> Cf. *United States v. Mendoza*, 464 U.S. 154 (1984) (nonparty to prior lawsuit may not use "offensive" collateral estoppel against the government).

In sum, neither the toehold interest itself, nor the expanded scope of the litigation based on that asserted toehold, was founded on an adequate showing of standing in this case.

<sup>26</sup> In authorizing judicial review at the behest of a person "adversely affected or aggrieved by agency action," 5 U.S.C. 702, the Administrative Procedure Act introduces no departure from this fundamental principle. Under that provision, a person aggrieved by a particular governmental order affecting particular lands may challenge that order in court. The suit authorized by 5 U.S.C. 702 is directed to the final "agency action" itself (embodied in that order); that provision does not authorize a more general judicial supervision of the agency program or policy pursuant to which the particular order (the "agency action") was adopted.

### C. The Court of Appeals' Misapplication Of Standing Principles Implicates Serious Separation-of-Powers Concerns

1. Standing requirements take on added significance when an exercise of judicial power would "affect[] relationships between coequal arms of the National Government," because "[r]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either" (*Valley Forge Christian College*, 454 U.S. at 473-474) (quoting *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)). Indeed, the standing requirements themselves arise out of a "single basic idea—the idea of separation of powers" (*Allen v. Wright*, 468 U.S. at 752)—in that they demarcate fundamental limits on the role of the federal courts in our tripartite system of government. Departures from the principles governing standing may, therefore, rupture those limits. "Relaxation of standing requirements is directly related to the expansion of judicial power" (*Richardson*, 418 U.S. at 188 (Powell, J., concurring)), and such relaxation may bring into court "generalized grievances more appropriately addressed in the representative branches" (*Allen*, 468 U.S. at 751).

2. The present case conspicuously illustrates the separation-of-powers concerns implicated by a basic misapplication of standing principles. Indeed, the very scope of the litigation reflects its lack of Article III moorings. Early on, the district court entered, and the court of appeals sustained, a preliminary injunction freezing—for nearly three years—the status of almost 180 million acres of public land. That acreage amounts to approximately 281,000 square miles, a size exceeding that of all the States on the eastern seaboard from North Carolina to Maine. In addition to halting more than 260 agricultural entries, the injunction froze hundreds of land sales and exchanges, including at least one transfer that even respondent acknowledged to be environmentally beneficial.

See pp. 14-15, *supra*. And in administering that massive injunction, the district court was required to assume the role of a nationwide land use czar—fielding an array of conflicting claims for exemptions, granting some, while rejecting others. See pp. 14-15 & nn.12, 13, *supra*.

But even without the injunction in place (for now), the litigation is overwhelming. If remanded for trial, the case will require the district court to review administrative records relating to the hundreds of individual land decisions challenged by respondent, and to determine in each instance whether the land use plan on which petitioners relied satisfied the prerequisites of FLPMA. Managing a litigation of such dimension aggregates expansive powers in the court, and withdraws them, correspondingly, from the executive officials charged by law with the day-to-day responsibility for administering the public lands. The result, in this case, is a lawsuit seeking judicial supervision of the Secretary's entire administration, throughout the Nation, of his duties under FLPMA.

Standing doctrines are designed to avoid such clashes between judicial and executive authority. Under our constitutional system, the judicial power may be invoked to resolve controversies between persons adversely affected by a particular governmental action and the officials who took that action, not to supervise public officials' general conduct of their duties. In this case, the failure of the district court (at first) and the court of appeals (throughout) to adhere to this basic precept of judicial power under Article III has led to "adjudication in a vacuum" (Pet. App. 105a)—a vacuum in which the court imposed massive injunctive relief, controlling a huge amount of public land and unrepresented third parties, without any showing of threat of injury-in-fact to respondent or any of its members. The court of appeals has now ordered this massive case to proceed to trial on the same flawed premise.<sup>27</sup>

<sup>27</sup> Relying on "the same boiler plate language and format" (Pet. App. 34a n.10) as the Peterson affidavit, the affidavit submitted by

## II. THE DISTRICT COURT CORRECTLY ENTERED SUMMARY JUDGMENT AGAINST RESPONDENT FOR LACK OF STANDING IN THIS CASE

In granting summary judgment in this case, the district court resolved two other issues in the government's favor. First, the court refused to permit respondent to supplement the record by submitting new factual affidavits after the close of the summary judgment hearing (see Pet. App. 28a-29a n.3). Second, the court found that the Greenwalt declaration, submitted in support of respondent's "informational standing" claim, was legally insufficient, in that it was "conclusory and completely devoid of specific facts" (*id.* at 32a). In reversing, the court of appeals held that the refusal to accept the supplemental affidavits was "unfair and an abuse of discretion" (*id.* at 21a). The court did not address the sufficiency of the Greenwalt declaration (see *id.* at 18a n.13). In our view, the trial court resolved both issues correctly.<sup>28</sup>

Richard Loren Erman (*id.* at 187a-189a) alleged a use of federal lands "in the vicinity" of the Grand Canyon National Park and the Arizona Strip (*id.* at 187a)—a 5.5 million-acre area, or about "one-eighth the size of the State of Arizona" (*id.* at 36a). Although the court of appeals did not reach the issue (see Pet. App. 18a n.13), the district court found the Erman allegations to be "vague, conclusory and lack[ing] [in] factual specificity" (*id.* at 36a). The district court therefore held that the Erman affidavit was insufficient for standing purposes. For the reasons stated in point I, *supra*, with respect to the Peterson affidavit, the district court was correct in finding the Erman affidavit similarly wanting.

<sup>28</sup> In reversing the order granting summary judgment, the court of appeals also held (Pet. App. 18a-20a) that the prior panel decision on the appeal from the entry of the preliminary injunction constituted the "law of the case" and therefore precluded reconsideration of respondent's standing. That holding, of course, does not affect this Court's decision, since a reviewing court obviously is not bound by the "law of the case" established by a lower court for purposes of its own further decision. Beyond that, the court of appeals' application of the "law of the case" doctrine is deeply flawed. First, a court is always free (indeed, where necessary, required) to examine its own jurisdiction, including a plaintiff's

## A. The District Court Did Not Abuse Its Discretion In Refusing To Permit Respondents To File Supplemental Affidavits Addressed To The Question Of Standing

Subject to the dictates of Fed. R. Civ. P. 56, the trial courts have broad authority to manage summary judgment proceedings in pending litigation.<sup>29</sup> More particularly, the decision whether or not to permit a litigant to supplement the record in a summary judgment proceeding is committed to the trial court's discretion. "Absent an affirmative showing by the non-moving party of excusable neglect \* \* \*, a court does not abuse its discretion in refusing to accept out-of-time affidavits." *Clinkscales v. Chevron U.S.A., Inc.*, 831 F.2d 1565, 1568 (11th Cir. 1987). See also *Farina v. Mission Investment Trust*, 615 F.2d 1068, 1076 (5th Cir. 1980); *Beaufort Concrete Co. v. Atlantic States Constr. Co.*, 352 F.2d 460, 462-463 (5th Cir. 1965), cert. denied, 384 U.S. 1004 (1966).

standing to commence an action. See *FW/PBS, Inc.*, 110 S. Ct. at 607-608. Second, allegations of injury that may be sufficient to survive a motion to dismiss or to warrant a preliminary injunction may not be sufficient to withstand a motion for summary judgment—which will typically be made on a fuller record, developed after more extensive discovery. See *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *United States v. SCRAP*, 412 U.S. at 689. Indeed, notwithstanding the second panel's determination (Pet. App. 19a-20a), the first panel decision in this case recognized that very point, stating that the allegations in the affidavit were "sufficiently specific for purposes of a motion to dismiss" (*id.* at 54a (emphasis added)). Finally, the earlier panel decision, which was predicated on the same inadequate affidavits that were before the court of appeals the second time around, is itself mistaken for the same reasons we have explained above.

<sup>29</sup> See, e.g., *Childers v. Joseph*, 842 F.2d 689, 693-694 n.3 (3d Cir. 1988); *Koplove v. Ford Motor Co.*, 795 F.2d 15, 18 (3d Cir. 1986); *Pasternak v. Lear Petroleum Exploration, Inc.*, 790 F.2d 828, 832-833 (10th Cir. 1986); *Anthony v. Baker*, 767 F.2d 657, 666-667 (10th Cir. 1985); *Clark Equipment Credit Corp. v. Martin Lumber Co.*, 731 F.2d 579, 581 (8th Cir. 1984).

Exercising that discretion in the present case, the district court rejected respondent's submission of the supplemental affidavits as untimely. Its decision was not an abuse of discretion. Despite repeated opportunities to offer new evidence, respondent steadfastly refused to supplement the record. Indeed, respondent had earlier resisted the government's effort to secure discovery on the standing issue, contending that further inquiry "would be unreasonably cumulative, duplicative, burdensome and expensive" (Motion to Quash and for a Protective Order at 7; Pet. App. 170a). Even after the government filed its summary judgment motion on standing grounds, respondent submitted no additional evidence to the court.

There is nothing "unfair" about respondent's predicament (see Pet. App. 21a). The government highlighted the insufficiency of the first three affidavits in a summary judgment motion devoted exclusively to standing. Respondent filed a response—but no new evidentiary materials—and thereafter let nearly two years go by. Only after the conclusion of the hearing on summary judgment, when the district court asked for additional legal memoranda, did respondent change its tune. Along with the requested memorandum, respondent submitted new affidavits, but offered no excuse for the tardy submission.

In these circumstances, the trial court acted entirely within its discretion in rejecting the offerings. The court of appeals' contrary conclusion should be reversed.<sup>30</sup>

<sup>30</sup> The court of appeals stated that "[n]o party to this litigation seriously disputes that [respondent's] supplemental affidavits, if considered, easily satisfy the level of specificity needed for standing under any of the Supreme Court's articulated tests." Pet. App. 21a. In our appellate brief, however, we had explicitly disputed the sufficiency of the supplemental affidavits. See Gov't C.A. Br. 34. Thus, even if the court of appeals had been correct in concluding that the trial court abused its discretion in refusing to consider the supplemental affidavits, we should have been permitted, in a remand to the district court, to contest the sufficiency and bona fides of the affidavits.

### B. The District Court Correctly Held That Respondent's Allegations Of "Informational Standing" Were Insufficient

Apart from claiming standing on behalf of its members, respondent also submitted a single declaration in support of the organization's standing in its own right, alleging injury to its ability to obtain and disseminate information crucial to the organization's mission. That declaration (Greenwalt Declaration, Pet. App. 193a-194a) described the organization's activities, and asserted that its ability to pursue its programs had been "significantly impaired by the failure of the Bureau of Land Management and the Department of the Interior to provide adequate information and opportunities for public participation with respect to the Land Withdrawal Review Program." *Id.* at 194a. The declaration provided no further details about the source or extent of respondent's injury.

It is well settled that an affidavit that "contains only conclusory allegations, not backed up by statements of fact, \* \* \* cannot defeat a motion for summary judgment." *Shane v. Greyhound Lines, Inc.*, 868 F.2d 1057, 1061 (9th Cir. 1989). "Mere conclusory statements \* \* \* do not take on dignity by placing them in affidavit form." *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1564 (Fed. Cir. 1987). Applying those principles, the district court concluded that the Greenwalt declaration's "bare claim" of injury was "conclusory and completely devoid of specific facts." Pet. App. 32a. Noting that respondent had the burden to make a showing as to each essential element of its case, the district court held, under *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), that respondent had failed to meet its burden to show that it had been deprived of any information.<sup>31</sup>

<sup>31</sup> The court further noted that although petitioners had no "burden to disprove [respondent's] conclusory contention" on this issue, petitioners had nevertheless "advised [respondent] of the environmental documentations and the methodology employed," and had

That conclusion was plainly correct.<sup>32</sup> The assertions contained in the Greenwalt declaration were insufficient to establish any injury to respondent's ability to gather or disseminate information. Like the Peterson affidavit, Greenwalt's declaration required, but omitted, crucial links in its chain of assertions. Although the declaration claimed that the government had failed to provide sufficient information about the review of classifications and withdrawals, it did *not* allege that BLM had withheld any particular information from respondent, or that the agency had denied respondent an opportunity to participate in the decisionmaking process. Indeed, the record would not bear out any such allegations: *all* of the pertinent evidence shows that BLM made its land status determinations, and all of the information leading up to them, fully available to the public, and that the agency consistently invited public participation. If respondent somehow overlooked that information, it has no one but itself to blame; indeed, even when the "extensive files" (Pet. App. 32a n.8) concerning each of these decisions were made available to respondent during the course of the litigation, no representative from the organization ever looked at them. July 22, 1988 Motions Hearing Tr. 49-50.

It may be that respondent could have *proven* an injury to its ability to gather or disseminate information (although we doubt it). The fact remains, however, that respondent did not even *assert* that it had tried to obtain

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made their "extensive files containing such information available for [respondent's] inspection" (Pet. App. 32a n.8).

<sup>32</sup> Although the court of appeals did not address the sufficiency of the Greenwalt declaration, the issue was resolved by the district court and fully briefed on appeal by the parties. See *New York City Transit Authority v. Beazer*, 440 U.S. 568, 583-584 n.24 (1979). Particularly where, as here, the issue is jurisdictional and the "facts" underlying the jurisdictional dispute issue are uncontroverted, this Court may reach the issue. See *FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. at 607-608.

information but was turned away, or that it had sought to participate in the decisionmaking process but was denied access. Having failed to make the requisite allegations, respondent lacks standing to assert an information-based claim.<sup>33</sup> See *Public Citizen v. United States Dep't of Justice*, 109 S. Ct. 2558, 2563 (1989) (plaintiffs had standing because they had "specifically requested, and been refused" particular information from an American Bar Association committee). See also *ibid.* (noting that in cases brought under the Freedom of Information Act, parties may secure standing by showing that "they sought and were denied specific agency records").

Accordingly, respondent wholly failed to establish its standing to sue, and the district court was therefore correct in awarding summary judgment against respondent.

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<sup>33</sup> While respondent's failure to substantiate its claim of injury is thus dispositive, we note further the lack of legal foundation for respondent's reliance on "informational standing" as a sufficient basis for asserting its broad and far-reaching legal contentions in this case. Even the Freedom of Information Act, 5 U.S.C. 552, which was enacted for the specific purpose of providing a right of access to government information, does not require the government, in response to information requests, to create documents that do not already exist. *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 152 (1980). Far less does that Act authorize lawsuits to interfere with the conduct of government activities while such documents are created, or while existing government documents are being compiled and disseminated. Similarly, lawsuits to restrain governmental action pending compliance with the requirements of environmental statutes, such as the procedural requirements of NEPA, have been founded on the plaintiff's showing of a requisite interest in the particular governmental action at issue—not merely a showing of the plaintiff's desire for information or its wish to be heard. See, *e.g.*, *SCRAP*, 412 U.S. 669.

CONCLUSION

The judgment of the court of appeals should be reversed.  
Respectfully submitted.

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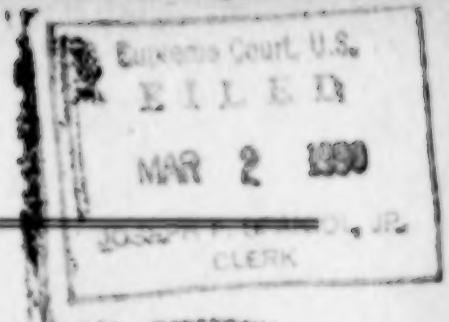
*Attorneys*

MARCH 1990

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\* The Solicitor General is disqualified in this case.

13  
No. 89-640



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In The  
**Supreme Court of the United States**  
October Term, 1989

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MANUEL LUJAN, JR., SECRETARY OF  
THE INTERIOR, *et al.*,

*Petitioners,*

v.

NATIONAL WILDLIFE FEDERATION,

*Respondent.*

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On A Writ Of Certiorari To The United States  
Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION  
AND MINERALS EXPLORATION COALITION AS  
RESPONDENT SUPPORTING PETITIONERS

---

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## QUESTIONS PRESENTED

1. Whether, in a lawsuit challenging a government program affecting the use or disposition of approximately 180,000,000 acres of public land, an environmental organization may establish standing to sue by relying on an affidavit asserting that one member of the organization makes use of property "in the vicinity of" a particular 2,000,000 acre parcel, only 4,500 acres of which were affected by one of 814 separate agency actions taken under the challenged program.

2. Whether the injury of Respondent may be fairly traced to the challenged program even though there are intermediate discretionary Executive actions between the program and the injury, and redress of the injury would require discretionary Executive action.

## LIST OF PARTIES

Mountain States Legal Foundation (MSLF) and the Minerals Exploration Coalition (MEC) were Defendants-Intervenors-Appellees in the United States Court of Appeals for the District of Columbia Circuit. MSLF and MEC filed a Petition for a Writ of *Certiorari* in this case on October 18, 1989. That Petition, docketed as No. 89-628, is pending before this Honorable Court.

The following were Defendants-Appellees in the United States Court of Appeals for the District of Columbia Circuit: Robert F. Burford, in his official capacity as Director of the United States Bureau of Land Management (Mr. Burford has been replaced in that capacity by Delos Cy Jamison); Donald Paul Hodel, in his official capacity as Secretary of the Interior (Mr. Hodel has been replaced in that capacity by Manuel Lujan, Jr); and the United States Department of the Interior.

ASARCO, Inc., was granted intervention in the District Court proceedings by the United States Court of Appeals for the District of Columbia Circuit. ASARCO, which was an Applicant for Intervention at the time, did not file a Notice of Appeal in the case at bar.

The National Wildlife Federation was Plaintiff-Appellant in the United States Court of Appeals for the District of Columbia Circuit and is Respondent to this petition.

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No. 89-640

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In The  
**Supreme Court of the United States**  
October Term, 1989

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MANUEL LUJAN, JR., SECRETARY OF  
THE INTERIOR, *et al.*,

*Petitioners,*

v.

NATIONAL WILDLIFE FEDERATION,

*Respondent.*

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On A Writ Of Certiorari To The United States  
Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION  
AND MINERALS EXPLORATION COALITION AS  
RESPONDENT SUPPORTING PETITIONERS

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OPINIONS BELOW

Review is sought of the opinion reported as *National Wildlife Federation v. Burford*, 878 F.2d 422 (D.C. Cir. 1989), appearing at pages 1a-25a of the Petition Appendix. The District Court's opinion, *National Wildlife Federation v. Burford*, No. 85-2238 (filed November 4, 1988), and Order appear at pages 26a-37a of the Petition Appendix. References to the Federal Petitioners' Appendix to their Petition for a Writ of *Certiorari* are hereinafter referred to as

"Pet. App." References to the Joint Appendix are hereinafter referred to as "Jt. App."

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## JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit rendered judgment against Federal Petitioners and Mountain States Legal Foundation (MSLF) and the Minerals Exploration Coalition (MEC) on June 20, 1989. Separate Petitions for a Writ of *Certiorari*, were filed by the federal government (No. 89-640) and MSLF and MEC (No. 89-628) on October 18, 1989. This court granted review of No. 89-640 on January 16, 1990. No. 89-628 is still pending.

This Court's jurisdiction arises pursuant to 28 U.S.C. § 1254(1) (1982).

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## CONSTITUTIONAL PROVISIONS INVOLVED

This action is based on article III standing requirements of the United States Constitution.

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## STATEMENT OF THE CASE

### The Withdrawal Review Program

Respondent in this case has undertaken a sweeping challenge of a broad, general purpose, statutorily mandated, government program: a program to eliminate unneeded withdrawals and classifications of the public

lands. Years, and in many cases decades, ago when the withdrawals and classifications in question were created, they served a multitude of purposes. However, since the purposes originally sought to be served by the withdrawals and classifications have ceased to exist, those outdated withdrawals and classifications of the public lands were eliminated by the Bureau of Land Management (BLM) under its Withdrawal Review Program pursuant to an Act of Congress. See 43 U.S.C. § 1714(l) (1982).

The public lands of the United States are generally available for a host of uses under numerous statutes. Both public and private entities can take advantage of opportunities to use the federal domain. For example, a private person can stake a mining claim,<sup>1</sup> request a land exchange to make management of his ranch easier,<sup>2</sup> or establish a communication site.<sup>3</sup> A public entity can build a dam, establish a military reserve, or create a park or wildlife refuge. Hundreds or thousands of other possible uses exist.

If an anticipated future use of a portion of the public lands would be exclusive of all other uses, then the federal land management agencies can "withdraw" that land from the public domain. For example, some of the withdrawals in this case involved proposed dam sites. If the government wishes to build a dam, then almost all other permanent uses in the flooded area are incompatible. The prudent federal land manager precludes those

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<sup>1</sup> See 30 U.S.C. § 22 (1982).

<sup>2</sup> See 43 C.F.R. Part 2200 (1988).

<sup>3</sup> See 43 U.S.C. § 1732(b) (1982).

incompatible uses by making a withdrawal. Land classifications work in a similar fashion. Many areas affected by this suit were classified for disposal or sale. Again, other permanent uses in areas to be sold would be incompatible so the prudent federal land manager uses a classification to restrict conflicting uses. See Jt. App. 87, 97-100.

The need for a Withdrawal Review Program became evident when many of the original purposes for which land had been withdrawn or classified failed to come to fruition. Many dams that had been proposed were never built. Most of the land that had been classified for sale was never sold and Congress subsequently changed its policy to discourage the sale of public lands. By the 1950s, it became clear that there were thousands of withdrawals and classifications which served no purpose and, in fact, obstructed efficient land use and management.

Withdrawal review began as an internal program of the Bureau of Land Management in 1956.<sup>4</sup> Apparently, little progress was made under that early program, because, in 1976, Congress mandated the Withdrawal Review Program at issue here and set a deadline for completion of that program in the Federal Land Policy and Management Act of 1976. 43 U.S.C. § 1714(l) (1982). As a result, in the late 1970s, the Carter Administration set up procedures for the Withdrawal Review Program

<sup>4</sup> See 2 C. WHEATLEY, *STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS*, 420 (1969).

and began to make the revocations that are challenged in this case. Jt. App. at 89-96. The Reagan Administration continued the Withdrawal Review Program.<sup>5</sup>

The sufficiency of the administrative process by which the Bureau of Land Management implemented the Withdrawal Review Program is the issue raised by Respondent's complaint. In reviewing the issue presented, this Honorable Court should be aware that the withdrawal revocations and classification terminations were accomplished through more than 814 separate agency actions. Each one of the 814 agency actions, constituting the program challenged in this case, was preceded by its own administrative decision-making process including that pursuant to the National Environmental Policy Act of 1970 (NEPA), 42 U.S.C. §§ 4331-34 (1982). Moreover, each revocation of a land withdrawal or termination of a land classification was announced in the *Federal Register*.

For example, the individual 4,500 acre parcel of land near Lander, Wyoming, that is the situs of the injury alleged by Respondent for standing, was opened to the operation of the public land laws, including the General Mining Law of 1872, only after a thorough administrative process. The BLM sought extensive public participation and conducted complete environmental review and planning, including the environmental action required by

<sup>5</sup> In its complaint, Respondent chose to address only those withdrawal revocations and classification terminations initiated after January 1, 1981. This constituted 180,000,000 acres, or an area larger than the States of Texas, New Hampshire, and Vermont combined.

NEPA. *Jt. App.* 123-139.<sup>6</sup> Environmental groups and others had ample opportunity to be heard – and they were heard – in the agencies' decision-making process before each individual action was undertaken, or proposed to be undertaken. *See Id.* However, Respondent did not challenge the proposed action near Lander, Wyoming, or, for that matter, any other individual proposed action taken under the Withdrawal Review Program.

This Honorable Court should also note that the intent of the congressionally mandated Withdrawal Review Program is not to terminate "environmentally protective" withdrawals and classifications. The only "protection" intended by the withdrawals and classifications is from conflicts in land use. Those conflicts no longer exist. Any environmental protection provided by the withdrawals and classifications is incidental at best. For example, a dam site or a bombing range withdrawal may prevent mining, but these withdrawals can hardly be classified as "environmentally protective." Probably the bulk of the

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<sup>6</sup> After the District Court received evidence on the procedures that were conducted in the area where Respondent claims injury for standing in this case, the Court made the following statement:

The Kelly Affidavit sets forth in great detail the voluminous process started in 1977 and concluded in 1984 that the BLM office in Lander, Wyoming followed in reaching its decision to terminate Classification No. W-6228. It completely answers plaintiff's claims of inadequate land use plans, lack of conformance determinations and insufficient opportunities for public participation.

*National Wildlife Federation v. Burford*, No. 85-2238, Memorandum Opinion at 10-11, n.12 (November 4, 1988), *Pet App.* 35a.

withdrawals and classifications was for such things as sales to the public or pathways for cattle drives.<sup>7</sup> Obviously, these withdrawals and classifications were not intended to provide "environmental protection."<sup>8</sup>

### Proceedings in This Case

On July 15, 1985, fourteen months after the decision by the BLM on the Lander parcel, Respondent brought suit to enjoin the Withdrawal Review Program. *Jt. App.* at 137. On December 4, 1985, the District Court issued a preliminary injunction precluding any originally prohibited activity on the 180,000,000 acres of withdrawal revocations and classification terminations made after January 1, 1981. The court enjoined approximately 814 past agency actions along with all similar future actions. The parcel of land near Lander, Wyoming, upon which Respondent asserts its sole basis for standing, was just one of the 814 areas regarding which activities were enjoined.

Approval of mining plans, which are of particular interest to Mountain States Legal Foundation and the Minerals Exploration Coalition, was enjoined. Also enjoined were such actions as removal of a dam site

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<sup>7</sup> The latter use accounts for a large number of revocations.

<sup>8</sup> The size of the Withdrawal Review Program and the disparate and extremely diverse nature of the 814 separate agency actions would not be appropriate for one of the stated objectives of Respondent, that is, a programmatic Environmental Impact Statement (EIS). Such a programmatic EIS would be totally useless in fulfilling the information requirements of NEPA.

withdrawal in the Grand Canyon, consolidation of land in wilderness areas, acquisition of private inholdings in wildlife refuges, and a land exchange involving the Nature Conservancy. Numerous other environmentally beneficial actions were enjoined as well. The injury complained of by Respondent to gain standing – primarily the opening of land to mineral exploration under the General Mining Law of 1872 – involved only 13,000,000 acres of the 180,000,000 acres enjoined by the suit, or about seven percent of the total acreage.<sup>9</sup>

Once the sweeping injunction was in place, Respondent assumed the role of *de facto* federal land manager. In at least one instance, the proponent of a land exchange, blocked by the injunction, contacted Respondent. Subsequently, for reasons known only to the proponent of the land exchange and Respondent, Respondent determined that the revocation of the outdated withdrawal or classification would benefit its interest. Respondent then filed a motion with the court to allow the revocation to proceed on that one parcel.<sup>10</sup>

This suit presented an untenable situation for the members of MSLF and MEC who must be able to rely on the certainty of federal permits and federal title for activities upon or rights to public land. MSLF and MEC

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<sup>9</sup> 13,000,000 acres is the land area opened to entry for mining under the General Mining Law of 1872, 30 U.S.C. § 22 (1982). The actual area disturbed by mining is only a few hundred acres.

<sup>10</sup> *National Wildlife Federation v. Burford*, No. 85-2238 (NWF Motion for Voluntary Dismissal, filed April 11, 1986).

members, who hold mining claims and mineral leases, after having completed every necessary environmental and public participation procedure at the local level were faced, following Respondent's lawsuit, with the prospect of losing all of their rights because of an alleged flaw in a nation-wide, congressionally mandated program.

In November of 1988, the United States District Court for the District of Columbia held that Respondent lacked standing to sue and granted summary judgment against Respondent. Respondent appealed to the Court of Appeals for the District of Columbia Circuit.

MSLF presented the foregoing facts and the following arguments in opposition to Respondent's appeal to the District of Columbia Court of Appeals. The Court of Appeals dismissed the arguments as being without merit. Pet. App. 12a, n.10. The Court of Appeals held that the one alleged injury caused by a classification termination near Lander, Wyoming – which Respondent failed to challenge during the lengthy environmental review process that preceded the classification termination – was sufficient to establish standing to challenge the entire program. Pet. App. 18a, n.13. Thus, the Court of Appeals held that Respondent, having forgone its earlier opportunity for a focused challenge to a specific proposed federal action, was now free to attack the broad, general purpose, statutorily mandated, government program under which the specific action was taken.

### Basis for Standing in This Case

In December of 1985, MSLF argued that Respondent had not substantiated its standing to sue. In May of 1986, Respondent filed three affidavits with the district court. The affidavit of Ms. Peggy Kay Peterson stated:

My recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of South Pass-Green Mountain, Wyoming have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department. In particular, the South Pass-Green Mountain area has been opened up to the staking of mining claims and oil and gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands.

Pet. App. at 191a. Another, almost identical, affidavit was submitted by Richard Loren Erman alleging use of land "in the vicinity of the Grand Canyon National Park, the Arizona Strip (Kanab Plateau), and the Kaibab National Forest." Pet. App. 187a-189a.

The Court of Appeals upheld standing based solely on the Peterson affidavit. Pet. App. at 18a, n.13.

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### SUMMARY OF ARGUMENT

In *Allen v. Wright*, 468 U.S. 737 (1984), this Honorable Court used the Separation of Powers Doctrine to aid in interpreting whether injury alleged for standing was fairly traceable to the alleged wrong-doing. The Argument of MSLF urges this Honorable Court to follow the *Allen* line of cases and expand on how the Separation of Powers

Doctrine should be used when analyzing causation to determine standing.

In the case at bar, Respondent claims to have been injured by a threat of mining in a small area of Wyoming. The alleged wrong-doing is in the structuring of an agency-wide program administered in Washington, D.C. In tracing the injury from the program to the mining threat, there are several intervening discretionary Executive actions. Notably, the action of opening the land to mineral entry – Respondent's only claim to direct injury – is completely within the discretion of the Executive Branch. Moreover, that discretionary action was not challenged in this lawsuit.

If a court were to fashion an order to redress Respondent's injury, then it would have to order the Executive Branch to exercise its discretion to prevent mining in that small area of Wyoming. Such an order affecting a discretionary Executive action which is not even before the court would be a serious breach of the Separation of Powers Doctrine. For that reason, where intervening discretionary Executive actions separate the injury from the wrong-doing or the injury from the relief, either the chain of causation or the chain of redress is broken and no standing can lie.

The analysis of how intervening discretionary Executive actions break the chain of causation or the chain of redress is consistent with this Honorable Court's past decisions denying standing for adjudication of government programs and generalized grievances.

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## ARGUMENT

Standing is that aspect of justiciability that focuses on the entity bringing a lawsuit. *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). In its analysis, a court asks if the plaintiff is the proper person to bring the lawsuit in question. The focus is not entirely personal, however. In recent years, this Honorable Court's analysis of standing has centered on three elements: 1) personal injury-in-fact; 2) that can be fairly traced to the challenged government action; and, 3) the requested relief will be likely to redress the injury. *Id.* at 751. The latter two elements look to the legal and factual surroundings of the lawsuit as well as the personal situation of the plaintiff.

The first requirement – personal injury-in-fact – has been reduced to an identifiable trifle.<sup>11</sup> *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 (1972). Cases establish that aesthetic injury qualifies to meet this requirement. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). While the case at bar presents serious questions as to whether Respondent has met this Honorable Court's injury-in-fact requirements, MSLF will not address them in detail. MSLF anticipates that the Federal Petitioners will address this topic at length. Instead, MSLF will concentrate its argument and analysis on the requirements of causation and redress as established by this Honorable Court's standing test.

<sup>11</sup> MSLF questions whether this amount of injury is sufficient to meet the requirements of article III. However, we leave it to others in this case, or other cases, to challenge this point.

In *Allen v. Wright* this Honorable Court elaborated upon and then expanded its previous applications of the causation and redressability tests – especially that applied in *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976). In particular, the Court chose to use the causation requirement of its three part test of standing as the means to examine the policy implications underlying standing – notably the Separation of Powers Doctrine. *Allen*, 468 U.S. 759-761. After *Allen*, one of the factors to be considered in analyzing causation is the impact on the Separation of Powers Doctrine.

This Honorable Court's decision to use the Separation of Powers Doctrine in its interpretation of the causation analysis of standing met with some criticism. It was argued that the Separation of Powers Doctrine should have been considered in issue-focused aspects of justiciability – *i.e.*, ripeness, mootness, or political question – or in prudential considerations, instead of the causation element of standing.<sup>12</sup> Indeed, the Doctrine has been applied in these situations in the past; however, the result has been unfortunate confusion. *See* 13 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3529 (2d ed., 1984).

MSLF believes that the course chosen by this Honorable Court was the proper one for several reasons. First, the causation element of the standing test is a constitutional test founded on article III of the Constitution. Past confusion over whether the application of the test of standing to ensure compliance with the Separation of Powers Doctrine was prudential or constitutional has been eliminated. *See Id.* Since Separation of Powers is a

<sup>12</sup> *See, e.g.,* Nichol, *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L.REV. 635 (1985) (Criticizing addition of Separation of Powers Doctrine to standing).

fundamental precept of the Constitution, it makes no sense to think that application of the standing test to ensure its preservation would be prudential. To the contrary, protection of the Constitution demands its application. Second, by focusing the analysis on the standing of a plaintiff, a court need not consider the merits of a case as thoroughly as would be necessary with issue-focused aspects of justiciability.

The case at bar presents an opportunity for this Honorable Court to analyze the elements of standing utilizing the Separation of Powers analysis set forth in *Allen v. Wright*. MSLF urges this Honorable Court to follow the line of cases represented by *Simon* and *Allen* and expand on the analysis as set forth below.

#### **I. THE CAUSAL LINKS BETWEEN RESPONDENT AND THE ALLEGED WRONG-DOING AND THE RELIEF SOUGHT ARE TOO TENUOUS TO SUPPORT STANDING.**

To meet the causation and redress elements of the test of standing this Honorable Court has looked at the relationship between a particular plaintiff and the issues of the case. While the Court does not look to the substance of a plaintiff's allegations, it must examine the causal links between the alleged wrongdoing and the plaintiff who seeks standing.<sup>13</sup> *Simon*, 426 U.S. at 41.

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<sup>13</sup> While in theory a court is not supposed to judge the merits of a claim, numerous commentators have complained that determinations of standing do involve judgment on the merits of a case. See, e.g., Varat, *Variable Justiciability and the Duke Power Case*, 58 TEX. L.R. 273 (1980). A more comprehensive definition of the causation and redressability elements may alleviate this criticism.

Causation is a chain of events leading from the alleged wrong-doing to the injury. Past decisions on whether the chain is strong enough to support standing have often been intuitive. 13 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3531.5 (2d ed., 1984). However, intuition or logic should consider, and be aided by, the underlying policy considerations. As in *Allen v. Wright*, the case at bar presents an appropriate situation for such policy analysis using the Separation of Powers Doctrine to interpret the causation element of standing.

Closely related to the causation element is that of redressability. The two "were initially articulated by this Court as 'two facets of a single causation requirement.' " *Allen v. Wright*, 468 U.S. at 753 n.19 (quoting C. WRIGHT, *LAW OF FEDERAL COURTS* § 13, p.68 n.43 (4th ed., 1983)). This close relationship is particularly evident in a case, such as this one, where the relief sought in the complaint is to set aside the alleged illegal action.<sup>14</sup> See *Id.* In fact, as shown by the analysis below, there is little substantive difference between the two. Like a chain of causation, redress of injury can require a chain of actions – a chain of redress. As a result of the close relationship between causation and redress, the following analysis will discuss the elements of causation and redress together.

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<sup>14</sup> It is important to distinguish the relief sought in the complaint – set aside of the Withdrawal Review Program for procedural errors – from the redress of Ms. Peterson's injury – presumably a prohibition of mining on 4,500 acres in Wyoming.

For purposes of this analysis of standing, Respondent's named member represents Respondent's interest. *Simon*, 426 U.S. at 40. Thus, in this case, the analysis must center upon Ms. Peggy Kay Peterson, the National Wildlife Federation member whose alleged injury served as the basis for the decision of the Court of Appeals to award standing to Respondent National Wildlife Federation. Pet. App. 18a.

Ms. Peterson, a person who might have an interest in 4,500 acres of land in Wyoming, sued to demand that the BLM's entire national Withdrawal Review Program be stricken and then reconstituted using different procedures.<sup>15</sup> The issue now before this Honorable Court is whether Ms. Peggy Kay Peterson is the proper plaintiff to bring this lawsuit.

On the one hand, we know very little about Ms. Peterson. Her affidavit indicates that she lives in Casper – some 140 miles from Lander – and uses some federal land for recreational purposes. The nature of the land or her recreational use is unknown.<sup>16</sup>

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<sup>15</sup> The lands in question were only "opened" to "mineral entry" under the General Mining Law of 1872, that is, American citizens who make a "discovery" of a "valuable" mineral may locate a mining claim on those lands. No mining activity which would cause a "significant" disturbance may take place without federal approval, including compliance with NEPA. See Jt. App. 62-64.

<sup>16</sup> An attempt by MSLF and the federal government to pursue discovery to ascertain these facts was blocked by a protective order. Pet. App. 170a.

On the other hand, the action she brings is to set aside and reconstitute the BLM's nation-wide Withdrawal Review Program, a congressionally mandated program that affects over 180,000,000 acres of federal land in 14 states. While she alleges harm from one termination of a land classification in Wyoming, she demands that 813 other agency actions across the country be set aside. The essence of her claim is that improper procedures were used to set up the program under which the 814 agency actions were taken.<sup>17</sup>

On the face of these facts, it is difficult to imagine what possible standing Ms. Peterson has to challenge the BLM's entire Withdrawal Review Program. On their face, these facts establish absolutely no link between the program and Ms. Peterson's alleged injury.

#### **A. The Chain of Causation and the Chain of Redress Are Too Attenuated to Support Standing**

An analysis of the chain of causation and the chain of redress in this case begins with a description of the facts that might make up the links of those chains. It should be noted that Respondent has failed to detail, either the chain of causation between the government action in setting up the Withdrawal Review Program and the injury Ms. Peterson claims, or the chain of government actions that would be

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<sup>17</sup> There is no evidence that Ms. Peterson participated in the public comment process that accompanied the BLM Management Framework Plan and the termination of the land classification that so concerned her. See Note 6 *supra*.

required to redress Ms. Peterson's alleged injury. The Court is left to speculate how the chains might be constructed.

Turning first to the chain of causation, Ms. Peterson's affidavit merely states that her "recreational use and aesthetic enjoyment of the federal lands, particularly those in the vicinity of South Pass-Green Mountain, Wyoming have been and continue to be adversely affected by the unlawful actions of the Bureau and Department." Pet. App. at 191a.

The reader of the affidavit is left to speculate which allegedly illegal actions are causing this injury. For that information one must look to Respondent's complaint. The illegal actions complained of are alleged procedural deficiencies in establishing the Withdrawal Review Program: specifically, failure to promulgate rules, failure to prepare a programmatic Environmental Impact Statement (EIS), and failure to prepare a specific type of land use plan.<sup>18</sup> Jt. App. at 18-22.

Using the information from the complaint, the chain of causation between the alleged illegal action and Ms. Peterson's alleged injury would be as follows: The procedural errors in setting up the program alleged by Respondent caused the BLM to fail to include in the

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<sup>18</sup> Initially, respondent alleged that the individual actions, e.g., the classification termination in the South Pass-Green Mountain area of Wyoming, were not supported by the administrative record. Respondent dropped that count upon filing its Motion for Summary Judgment. See note 20 *infra*. Later the district court found the record in the Lander, Wyoming, classification termination completely adequate. See note 6 *supra*.

Withdrawal Review Program directives to state or local BLM offices that would address Respondent's concerns, i.e., that mining not be allowed on the public lands. The absence of the planning directives resulted in the failure of the local BLM Management Framework Planning process to take into consideration Respondent's opposition to mining. The supposedly faulty planning process then caused the BLM to open the land to mineral entry.

However, consideration of the chain of causation must not end there. A prospector must discover sufficient mineralization to warrant staking a mining claim on the land. Next, the prospector must discover sufficient quantities of minerals to warrant submission of a mining plan of operations. Following that, the BLM must approve a plan of operations which complies with NEPA and contains environmental mitigation measures. See Jt. App. 62-64. Finally, mining must actually take place and the BLM in its application of the NEPA process must fail to mitigate the harm that is of concern to Ms. Peterson.<sup>19</sup>

The question posed in the analysis of this chain of causation is whether an alleged procedural error in setting up the national Withdrawal Review Program is the cause of a hole in the ground that offends the aesthetic sensibilities of Ms. Peterson. On the record presented by Respondent, the answer is undiscernable. Respondent has made no allegations to support any chain of causation

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<sup>19</sup> For example, mining need not harm wildlife habitat, let alone "the wildlife habitat potential" which is of concern to Ms. Peterson. Many mining plans include habitat enhancement as a mitigation measure to offset any disturbance.

linking the procedures establishing the Withdrawal Review Program to the aesthetic injury in Wyoming.

With regard to the other element of standing considered in this Argument, that is, the redress of grievances, Respondent again leaves the construction of that chain to the Court:

Given my recreational use and enjoyment of the federal lands, my concern in ensuring that the laws pertaining to their preservation and protection are enforced, and my interest in participating in decisions affecting their future management, my interests are being adequately represented by NWF in its lawsuit against the Bureau and the Department and my interests will be fairly redressed by a decision favorable to NWF.

Pet. App. at 191a-192a. Ms. Peterson fails to mention how a favorable decision for NWF will redress the aesthetic injury she claims to have suffered. She does not mention how or whether mining on the 4,500 acres of land in question will be prevented by this suit.

If Ms. Peterson's aesthetic injury is to be prevented, then there must be a chain of redress linking a court's order for new procedures to reconstitute the Withdrawal Review Program to the continued closure of the 4,500 acres to mineral location. A hypothetical construction of the chain of redress is as follows: The new court-ordered-procedures must be likely to result in program directives that will cause state and local BLM offices to prohibit mining or keep lands closed to mining that would otherwise be opened. The program directives would be considered in the BLM's planning process. The BLM must then

act on those directives and prohibit mining on the particular land Ms. Peterson uses.

The BLM directives resulting from the court-ordered-procedures could apply to environmentally sensitive lands, or they could apply in a general fashion to all lands in the Withdrawal Review Program. Since Respondent provides no indication of the nature of the 4,500 acres of land – whether it has any special aesthetic attributes or other qualities – the directives would be of a type that generally discourage mining. Those directives would be likely to cause continued closure of the 4,500 acres and thus provide Ms. Peterson her redress.

#### **B. Judicial Recognition of the Chain of Causation and the Chain of Redress in This Case Violates the Separation of Powers Doctrine**

To apply the analysis suggested in *Allen*, this Honorable Court should examine each link of the chain of causation and the chain of redress to see its affect on the Separation of Powers Doctrine. 468 U.S. at 760-61. In examining each link two situations bear special consideration: first, where the direct cause of the injury is a discretionary action of the agency – other than an action challenged in the suit – and second, where redress would require a court to order an agency to exercise its discretion in a particular manner. In either instance, the Separation of Powers Doctrine will weigh against a finding of standing.

It is fundamental that standing requires direct causation. *Ex Parte Levitt*, 302 U.S. 633 (1937). However, if what is challenged as illegal in a lawsuit is not the discretionary action which is the direct cause of the injury, but another discretionary action which only indirectly bears

upon the first action, then causation is significantly diluted or the chain of causation is broken. For example, in challenges to allegedly unconstitutional statutes which were financed by subsequent – but unchallenged – taxes, this Honorable Court has denied standing based on taxpayer injury, in part because of the intervening discretionary congressional act of implementing taxes. *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923). See also *Flast v. Cohen*, 392 U.S. 83, 118-19 (1968) (Harlan, J. dissenting, explaining *Frothingham*). The tax which was the direct cause of the injury did not convey standing to challenge the original acts financed by the taxes. A similar situation exists where the injury-in-fact used to establish standing is based on a specific agency action and the legal challenge is not against that action, but rather against an agency program or policy. Like the taxpayer cases, the intervening discretionary actions break the chain of causation.

Moreover, the very nature of discretionary Executive Branch actions weighs against them as links in a chain of causation to establish standing. Each and every federal action embodies the consideration of a myriad of policies: on the environment, on economics, on national security, on immigration, on energy and mineral supply, on balance of payments, and on numerous other policies. A federal decision-maker utilizes his discretion to weigh each of these policies and then to make a judgement on how each should be applied in a given instance. If discretionary actions were subject to being set aside because of flaws in the creation of the policies or the programs that created the policies, then each individual action could be set aside for a myriad of reasons indirectly related to the action itself.

If a particular interest group chooses a given policy or program and litigates on that basis at every opportunity, then the decision-makers will have no choice but to give special recognition to that policy. If they do not, and the courts hear the complaint, then the administrative decision-making process will be constantly and regularly disrupted by judicial intervention. See Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983) (regarding "over judicialization of the process of self governance"); J. RABKIN, *JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY* (1989). The net result is that litigants can and have used the courts to elevate their own particular policy concerns at the expense of the policy concerns of the rest of the citizenry and at the expense of the duty of the Executive Branch to serve the interests of all the American people.

Turning to an analysis of the alleged personal injury in the case at bar, several of the links in the chain of causation between Ms. Peterson's alleged injury and the asserted illegalities in setting up the Withdrawal Review Program are discretionary actions of Executive Branch agencies for which no violation of the law is alleged. The last link that can be directly attributed to the agency – the opening of the 4,500 acres of land to mineral entry near Lander, Wyoming – is within the agency's discretion. Other than the alleged programmatic deficiencies, Respondent has not alleged that this action was illegal.<sup>20</sup>

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<sup>20</sup> Respondent dropped its challenge to the administrative record upon filing for summary judgement on June 5, 1986.

Moreover, Respondent has introduced no facts or law which indicate that the BLM decision to allow mineral entry on the 4,500 acres would be different under the reconstituted program which Respondent apparently seeks.

In the case at bar, Respondent has made no secret of the fact that it thinks the Administration favored a policy of promoting mineral development and did not give enough emphasis to the environmental concerns Respondent favored. However, if that is Respondent's concern then Respondent can still prevent, or at least affect, the mining activity to which it objects by participating, on a case-by-case basis, in the land use planning and administrative decisions leading to mining. Congress has directed the Executive Branch both to foster mineral development and to protect the environment. See Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a (1982); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4331-34 (1982). Those allegedly conflicting directives are not to be sorted out by litigants in the courts but are to be decided by the Executive Branch.

In an analysis of each link of the chain of redress, the question arises whether a court should order an agency to exercise its discretion in a particular manner. However, it is clear that such a court order to an agency would raise the issue of the Separation of Powers Doctrine and cast doubt upon the justiciability of the case.

Should a federal district court seek to redress the particular injury alleged by Ms. Peterson, it would have to order that the 4,500 acres in question remain closed to mineral entry, or alternatively, it would have to impose

procedures that would make it "likely" that the land would remain closed to mineral entry. See *Simon*, 426 U.S. at 43-44. Considering that this land is not alleged to have any special attributes, any ordering of such relief by a district court would constitute an intolerable intrusion into the management of the federal lands by the Executive Branch.

If the district court chose to limit its relief to ordering program directives that predetermined the outcome of the BLM's decision to open the 4,500 acres to mineral entry, it would be engaging in a similar intrusion. The illegal actions complained of go to the procedural steps of establishing the program, not to the substantive content of the Withdrawal Review Program directives. For a court to dictate the content of directives on how to review withdrawals and classifications of public land would be a clear intrusion into the Executive's function as manager of the federal lands and a violation of the Separation of Powers Doctrine.

Finally, if a district court chose to limit its relief to ordering new procedures in setting up the program, that order would have no discernable impact on Ms. Peterson's injury. There is simply no evidence, argument, or indication that the particular 4,500 acres Ms. Peterson claims to use would be treated differently if the program were reconstituted using different procedures. The redress element of the standing test fails. Thus, this case is not justiciable.

## II. THIS HONORABLE COURT HAS HISTORICALLY TREATED ALLEGED INJURIES BASED ON PROGRAMS AND POLICIES AS TOO INDIRECT TO SUPPORT STANDING

From the beginning, this Honorable Court has given wide latitude to the prerogatives of the Executive Branch. In *Marbury v. Madison*, Chief Justice John Marshall noted:

The province of this court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

5 U.S. (1 Cranch) 137, 170 (1803).

Later, when various plaintiffs have asked this Honorable Court to adjudicate programs, the Court has declined. For example, in *Ashwander v. TVA*, 297 U.S. 288 (1936), this Honorable Court addressed a challenge to an individual agency action and to the program under which the action was taken. While the challenge to the single agency action – a TVA contract – was allowed, the challenge to the program under which the contract was authorized was not. This Honorable Court found that the program being challenged “did not give rise to a justiciable controversy save as [it] had fruition in action of a definite and concrete character.” *Id.* at 324.

This Honorable Court has more recently addressed challenges to agency programs in *Allen v. Wright*, 468 U.S. 737 (1984). In *Allen*, this Honorable Court used the “fairly traceable” element of standing in its reasoning. The Court discussed the issues as follows:

The idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that respondents’ alleged injury ‘fairly can be traced to the challenged action’ of the IRS. . . . That conclusion would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication.

*Id.* at 759-60.

One reason for lack of standing is that a program never works a direct injury on a plaintiff. Only actions that work direct injuries are subjects for federal court adjudication. See *Ex Parte Levitt*, 302 U.S. 633 (1937).

Another reason for restricting adjudication of programs and policies is the potential scope of the litigation. The case at bar is ostensibly a dispute between Ms. Peterson and the BLM over the status of 4,500 acres of land in Wyoming, yet the relief requested affects at least 814 separate agency actions covering 180,000,000 acres in 14 states. Individuals, companies, and even environmental groups who had acquired interests in the public lands found their activities effectively blocked by the suit filed by Respondent and Ms. Peterson.

If all of those affected had tried to intervene to protect their interests the case would have become unmanageable. As it was, several with the most pressing conflicts did intervene or tried to intervene. For example, ASARCO, Inc., a mining company with claims in Oregon, sought to intervene. It had staked claims on land that had

once been classified for sale. While the "for sale" classification was supposed to expire automatically, the BLM had included its removal in the Withdrawal Review Program. For that reason ASARCO's mining claims were in doubt. There was never any "environmentally protective" restriction on the land. There was never any indication that Ms. Peterson or any other named member of the National Wildlife Federation would be offended or affected by ASARCO's proposed activities.<sup>21</sup>

Others who were impacted included the Trust for Public Land and the Nature Conservancy. Even the National Wildlife Federation petitioned the court for relief on one parcel of land. Pet. App. at 174a-175a.

Judge Williams of the District of Columbia Court of Appeals made the following statement in dissenting from that court's decision to uphold the preliminary injunction:

The majority today upholds a district judge's self appointment as *de facto* Secretary of the Interior over 180 million acres - nearly one-fourth of all federal lands and more than one half of the public lands managed by the Bureau of Land Management ("BLM"). It does so without a showing that the BLM breached any legal requirement as to a single parcel of land. Even assuming such a breach, the record is barren of any hint that it was material or likely to harm plaintiff's interests - much less irreparably. Unable to sanction such a judicial usurpation of power, I dissent.

*National Wildlife Federation v. Burford*, 835 F.2d 305, 327 (1987).

<sup>21</sup> Except, of course, NWF's generalized grievance against mining.

This Honorable Court should follow the *Ashwander-Allen* line of cases which holds that programs and policies of the Executive Branch are not justiciable.

### III. THE PROGRAMMATIC AND POLICY INJURIES IN THIS CASE ARE NO MORE THAN A GENERALIZED GRIEVANCE

The very nature of the case at bar as a generalized grievance is underscored by the affidavit of Ms. Peggy Kay Peterson. Ms. Peterson does not ask for a halt to mining on the 4,500 acres she might use in Wyoming, rather she asks that her "concern in ensuring that the laws pertaining to their preservation and protection are enforced . . ." Pet. App. at 191a-192a.

The subject matter of this lawsuit is one quarter of all of the public lands of the United States, an area equal in size to the States of Texas, Vermont and New Hampshire combined. Hundreds of individual agency actions make up the challenged program. This suit is one that would never logically be brought by an individual acting in his or her own private interest. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). This is a suit that could only be brought by a national political advocacy group. Its purpose is to question the wisdom of the management of the public lands by the Executive Branch. As this Honorable Court stated in *Laird v. Tatum*:

Carried to its logical end, [Respondent's] approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary, absent actual present or immediate

threatened injury resulting from unlawful government action.

408 U.S. 1, 15 (1972) (quoted in *Allen v. Wright*, 468 U.S. at 760).

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## CONCLUSION

Respondent in this case seeks to set aside a nationwide program affecting over 180,000,000 acres of federal land. To establish its "standing" to bring this suit, Respondent claims a threatened injury on 4,500 acres in Wyoming. The connection between the threatened injury and the program is not direct. A discretionary Executive Branch action not challenged in this suit is the direct cause of Respondent's alleged injury. If a court were to adjudicate this case and grant relief it would be required to assume jurisdiction over that discretionary action and thousands of others like it. This would do great violence to the Separation of Powers Doctrine that is so fundamental to our Constitution.

For this reason and the other reasons set forth above, this Honorable Court should reverse the Court of Appeals and find that Respondent has no standing to sue.

Respectfully submitted,

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**Supreme Court of the United States**  
**Washington, D.C.**

**WALTER J. REAGAN, JR., SECRETARY OF THE**  
**RECORDERS, et al.,**

*Petitioners,*

**NATIONAL WIRELESS FEDERATION,**

*Respondent.*

**On Petition for Review of the United States Court of Appeals  
for the District of Columbia Circuit**

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### QUESTIONS PRESENTED

1. (a) Whether this Court should dismiss the writ as improvidently granted where the Court of Appeals ruled, as an independent ground supporting its judgment and pursuant to the longstanding practice in the D.C. Circuit, that the District Court abused its discretion in refusing to consider supplemental affidavits irrefutably establishing respondent's standing.  
(b) If not, whether the Court of Appeals' decision on the District Court's abuse of discretion was correct.
2. Alternatively, whether the Court of Appeals was correct in its conclusion that respondent had standing in its representational capacity where the record as a whole, including the Government's own evidence, proved injury-in-fact to the organization's members from the governmental program at issue.
3. Alternatively, whether the case should be remanded to the Court of Appeals for its decision, not heretofore necessary, as to whether respondent had standing because the record as a whole demonstrated injury to the organization itself.

### PARTIES TO THE PROCEEDINGS

Respondent adopts the Government's statement except that United States Representative John F. Seiberling intervened in the lawsuit to vindicate his own interests.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

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No. 89-640

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MANUEL LUJAN, JR., SECRETARY OF THE  
INTERIOR, *et al.*,  
v. *Petitioners,*  
NATIONAL WILDLIFE FEDERATION,  
*Respondent.*

On Writ of Certiorari to the United States Court of Appeals  
for the District of Columbia Circuit

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**BRIEF FOR RESPONDENT**

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**CONSTITUTIONAL AND STATUTORY PROVISIONS**

In addition to Article III, Section 2 of the Constitution and the Administrative Procedure Act, 5 U.S.C. § 702, cited by the Government, the following statutory and regulatory provisions are cited in this brief and included in Appendix A for the convenience of the Court: The National Environmental Policy Act, 42 U.S.C. § 4332(2)(C); the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701(a)(2), (a)(3), (a)(7); 1702(c), (d), (j); 1712(a), (d), (f); 1714(a), (l); 1732(a); 1739(e); 1740; Pub. L. No. 94-579, § 701(c); 43 C.F.R. §§ 1601.0-5(k), .0-6.

**STATEMENT**

This action seeks judicial review of the environmental impact of a single federal program, the ongoing "Land Withdrawal Review Program" (Program) of the United

States Department of the Interior (Government).<sup>1</sup> Under this Program, the Government terminated or revoked restrictions on approximately 180 million acres of federal land between 1981 and mid-1985, and thereby opened the land for commercial uses, including mining and mineral exploitation. Although the trial court issued a preliminary injunction in 1985, the injunction was subsequently vacated by the court on November 4, 1988, and the Program (with its consequent environmental impact) thus continues unimpeded today.

In July 1985, respondent, the National Wildlife Federation (NWF), filed suit challenging the Program as violative of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 *et seq.* (1982), the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.* (1982), and the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq.* (1982). In its amended complaint filed August 19, 1985, NWF stated that it had over 4.5 million members and supporters and alleged that:

NWF and its members are suffering and will continue to suffer injury in fact as a result of the challenged actions. Members of NWF use and enjoy the environmental resources that will be adversely affected by the challenged actions. They regularly use these resources for fishing, hunting, bird and wildlife watching, canoeing and boating, hiking, camping, and other similar activities. These persons' use and enjoyment of these resources will be irreparably injured if the defendants are permitted to terminate protective land use restrictions and thereby open up public lands to exploration, development, and disposal, without the development of land use plans, without prior preparation of adequate environmental impact statements, and without compliance with ap-

<sup>1</sup> The Government disputes that the Program is a program and characterizes it as "hundreds of executive branch decisions." Ptrs. Br. 2. But see p. 23 n.36, *infra*.

plicable laws, regulations, and procedures. Among other things, the challenged actions will adversely affect plaintiff and its members by destroying fish and wildlife habitat, and by impairing natural beauty. [JA 12.<sup>2</sup>]

NWF also alleged that the Government had violated the law, and had injured both NWF and its members, by denying them information about the Program and an opportunity to participate in decision-making relating to the Program. JA 12.

NWF appended as Exhibit A to the amended complaint a list of 814 examples of land status actions, including terminations of land classifications and land withdrawals,<sup>3</sup> taken by the Government pursuant to the challenged Program since January 1, 1981. JA 25-50.

Congress enacted FLPMA in 1976 in a comprehensive effort to rewrite the law of federal lands. The Act provides in Section 701(c) that "[a]ll withdrawals, reservations, classifications, and designations in effect as of the

<sup>2</sup> "JA" refers to the Joint Appendix in this Court, "Pet. App." to the Appendix to the Government's petition for a writ of certiorari, "Oppcert. App." to the Appendix to NWF's brief in opposition, "Ct. App. JA" to the Joint Appendix before the Court of Appeals, "ER" to the Excerpt of Record in the Court of Appeals, "Tr." to the transcript of a hearing in the District Court, and "Def.-Int. Ex." to an exhibit introduced by defendant-intervenor Mountain States Legal Foundation. While some affidavits, and some exhibits to affidavits, are set forth in the Joint Appendix, the Appendix to the petition, and the Appendix to the brief in opposition, others are not. Thus, "1B Edwards Aff. Ex. 21B" refers to Exhibit 21B to the Edwards affidavit marked 1B; while the 1B Edwards affidavit appears in the Joint Appendix (JA 87), Exhibit 21B to that affidavit does not.

<sup>3</sup> "Classifications" designate public lands for retention in federal ownership. See 43 U.S.C. § 315f. "Withdrawals" remove or segregate designated land otherwise in the public domain, and thus exempt it from the application of one or more federal disposal laws. See 43 U.S.C. § 1702(j). The District Court found that withdrawals and classifications represent "the only absolute shield against private exploitation of these federal lands." Pet. App. 134a.

date of the approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law." Pub. L. No. 94-579, § 701(c), 90 Stat. 2743 (1976).

Between FLPMA's enactment in 1976 and 1980, the Government engaged primarily in completing an inventory of withdrawn or classified lands. JA 91-93. In 1981, however, the Government began a comprehensive program to terminate withdrawals and classifications "to open 'locked-up' Federal land to mineral exploration and development through aggressive pursuit of the withdrawal review program." Pl. Ex. 70. The Bureau of Land Management (BLM) issued new instructions to its field offices to eliminate withdrawals as quickly as possible:

The new administration has stated clearly its objective to eliminate all unnecessary withdrawals of Federal lands, opening as many acres as possible to the operation of the mining and mineral leasing laws. [Pl. Ex. 73.]

A new guidance manual setting forth "Program Direction" and "Program Priorities" was issued. 1B Edwards Aff. Ex. 21B. Terminations of withdrawals and classifications subsequently proceeded rapidly under the Program. By mid-1985, the Government had terminated protective classifications and withdrawals for approximately 180 million acres of public land. JA 51-54, 65, 103; Parker Aff., par. 35.

The Program thus opened many millions of acres of public land to commercial development, particularly mineral exploitation, that have important recreational, environmental, or other public values. For example, the Government terminated a reclamation withdrawal covering 34,285 acres in Utah, opening 8,360 acres to the operation of the mining laws, 46 Fed. Reg. 7,348 (1981), despite the prospect that mining would have an adverse impact on two endangered species of fish, as well as potential impacts on endangered bald eagles and peregrine

falcons. Pl. Ex. 74. In addition, campgrounds and other recreational sites have been opened to mining and mineral leasing. *See, e.g.*, 49 Fed. Reg. 32,808 (1984); 47 Fed. Reg. 11,671 (1982).

The Government's evidence showed that the opening of lands through terminations even prior to the issuance of the injunction in 1985 had resulted in the staking of over 7,000 mining claims and 91 operating mines,<sup>4</sup> that over eight million acres had been opened to mineral leasing,<sup>5</sup> and that 1,000 or more leases had been issued, with several hundred more pending. Parker Aff., par. 44.

The Government's ongoing Land Withdrawal Review Program will be dispositive ultimately of the future status of nearly 250 million acres of federal land. JA 92, 99. Yet the Government prepared no environmental impact statement (EIS) prior to implementing the Program, despite NEPA's requirement, 42 U.S.C. § 4332(2)(C), that every major federal action "significantly affecting the quality of the human environment" must be preceded by an EIS. NWF, in Count IV of its amended complaint, JA 18-19, sought compliance with this law.

Recognizing the potentially far-reaching effect of the disposition of federal lands under FLPMA, Congress enacted key provisions requiring land use plans. Thus, FLPMA provides that

the national interest will best be realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process. [43 U.S.C. § 1701(a)(2).]

That broad policy is made specific in Section 202 of the Act with the requirement that land use plans "shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses." 43

<sup>4</sup> Ct. App. JA 162-163; JA 73, par. 33; JA 108, par. 23.

<sup>5</sup> JA 66-67, par. 26; JA 104, par. 20.

U.S.C. § 1712(a). See also 43 U.S.C. §§ 1701(a)(3), 1712(d); Pub. L. No. 94-579, § 701(c), 90 Stat. 2743. The Government's regulations define the land use plans required by FLPMA as "Resources Management Plans" (RMPs). 43 C.F.R. § 1601.0-5(k) (1989). At the time the lawsuit was filed, the Government had completed only nine of more than 100 required RMPs. Pl. Ex. 4. Count I of NWF's amended complaint challenged the Government's decision to proceed with its Program in the absence of the required land use plans. JA 15-16.<sup>6</sup>

NWF also sought to enforce other provisions of FLPMA:

—The Act requires the Government to submit recommendations regarding the revocation of withdrawals to the President and to Congress prior to opening the lands. 43 U.S.C. § 1714(l); see also Pub. L. No. 94-579, § 701(c), 90 Stat. 2743. The Government has readily admitted that not one of the terminated withdrawals covering almost 20 millions acres of federal land has been submitted under this review provision. Tr. (Sept. 16, 1985) 38. Count II of the amended complaint challenged this failure. JA 16-17.<sup>7</sup>

<sup>6</sup> Rather than preparing RMPs, the Government relied on "Management Framework Plans," which do not meet the requirements established for RMPs. The District Court found in 1985 that the Government's "reliance on 'Management Framework Plans' (MFPs) is misplaced and does not satisfy the statutory expectations of 'land use plans.'" Pet. App. 132a.

<sup>7</sup> The Government moved to dismiss Count II for lack of standing. The District Court granted the intervention of United States Representative John F. Seiberling on Count II, confirmed his standing, and upon Congressman Seiberling's retirement from Congress, allowed the substitution of Congressman Bruce F. Vento, Seiberling's successor as Chairman of the Subcommittee on National Parks and Public Lands, and reaffirmed his standing. Order of June 2, 1987. Congressman Vento withdrew his separate appeal after the 1989 unanimous Court of Appeals ruling that NWF had standing, since where one plaintiff has standing, courts do not generally consider whether other plaintiffs also have standing.

[Continued]

—FLPMA requires the Government to provide opportunities for meaningful public participation in "the preparation and execution of plans and programs for, and the management of, the public lands." 43 U.S.C. § 1739(e); see also 43 U.S.C. §§ 1701(a)(5), 1712(f), 1702(d). Count VII of NWF's amended complaint challenged the Government's failure to provide public participation in the Program and in the actions completed under its aegis. JA 20-21.<sup>8</sup> The District Court found that "[d]espite the statutory command, [the Government] ha[s] failed to provide for public participation in [its] withdrawal revocation decisions." Pet. App. 133a.

—FLPMA requires that the Secretary of the Interior "with respect to the public lands *shall* promulgate rules and regulations to carry out the purposes of this Act and other laws applicable to the public lands." 43 U.S.C. § 1740 (emphasis added); see also APA, 5 U.S.C. § 553. Count V of NWF's amended complaint challenged the

<sup>7</sup> [Continued]

*Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981); see Pet. App. 130a.

<sup>8</sup> For example, under NEPA the Government is required affirmatively to solicit comments on any draft EIS "from those persons or organizations who may be interested or affected." 40 C.F.R. § 1503.1(a)(4) (1989). Since no EISs were prepared, NWF was afforded no opportunity to comment on the potential environmental consequences of a federal Program affecting millions of acres of federal land.

Nor did the Government provide any other opportunities for public participation in the development and execution of the Program. It failed to adopt regulations governing the Program in accordance with the notice and comment provisions of the APA, 5 U.S.C. § 553. Under existing planning regulations, the Government was required to, but did not, publish draft plans for public comment as well as complete EISs on resource planning areas. 43 C.F.R. § 1610.2(f)(3) (1989). FLPMA also specifically requires, 43 U.S.C. §§ 1701(a)(5), 1739, opportunities for public involvement in all land management decisions. Yet no notice of proposed withdrawal and classification terminations was provided to the public. Govt's Responses to Plaintiff's 2d Set of Interrogatories No. 1(f).

Government's failure to promulgate these regulations to guide implementation of the Program. JA 19-20.<sup>9</sup>

Evidence presented by the Government itself demonstrated that if the statutory and regulatory scheme had been followed, the results of the land withdrawal review process almost certainly would have been different.

Affidavits showed, for example, that before terminations were completed, the Government created not EISs but in some instances Environmental Assessments ("EAs"), which were not available for public comment and each of which was, in part, "to determine *whether* an EIS is required"<sup>10</sup>; did not use RMPs but rather MFPs<sup>11</sup>; did not publish notice to the world in the *Federal Register* but rather in some instances carried out selective telephone calls, personal interviews, town meetings, workshops, and the like<sup>12</sup>; and did not work from regulations but rather from a series of internal manuals, instructional memoranda, directives, and brochures.<sup>13</sup>

These affidavits also showed that when it was later brought to the Government's attention that certain terminations would adversely impact scenic resources or fish and wildlife habitat, the terminations often had to be revised.<sup>14</sup> It was NWF's position that if the Government

<sup>9</sup> In addition, Count III of the amended complaint attacked the Government's failure to follow FLPMA's requirement, 43 U.S.C. §§ 1732(a), 1702(c), that public lands be managed in accordance with principles of multiple use and sustained yield, JA 17, and Count VII challenged the Government's failure to follow applicable regulations in carrying out its Program. JA 21. Count VI, JA 20, was subsequently withdrawn.

<sup>10</sup> JA 63 (emphasis added); see also JA 60-61, 135, 193-194.

<sup>11</sup> JA 125, 126-137, 179-194; see n.6, *supra*.

<sup>12</sup> JA 127, 129, 134, 137-139, 183, 194.

<sup>13</sup> JA 57, 59, 60, 88, 91-95, 102, 126-127, 182-184, 187-189, 190, 192-193.

<sup>14</sup> JA 134, 136-137.

had followed the congressional command, these adverse impacts would have become clear at the outset, rather than in a selective and haphazard fashion after the terminations had already occurred, and would have prevented terminations across the board.

Thus, in its request for permanent relief, NWF sought, among other things, the completion of the required EISs, the promulgation of regulations governing the Program, adequate notice about, and opportunities for public participation in, the Program, and the submission of proposed actions to the Congress and the President for review. JA 22.

To demonstrate the injuries actually suffered by its members, NWF submitted in April 1986 the affidavits of Peggy Kay Peterson and Richard Loren Erman. Pet. App. 187a-192a. In their affidavits which are dealt with more fully in the Argument below, both Peterson and Erman alleged that they used the federal lands adversely impacted by the Government's Program. They both gave specific examples of areas in the vicinity of which they recreated, areas which had been opened to mining by the Program, areas where the aesthetic beauty and wildlife habitat had been threatened, and areas where their own recreational use and aesthetic enjoyment had been adversely affected by the Government's Program. They also swore that their interest in participating in decisions affecting the preservation and protection of these lands had been adversely impacted by the Government's failure to provide proper notices and opportunities to participate. *Id.*<sup>15</sup>

<sup>15</sup> In June 1986, the Government served subpoenas on NWF, seeking to take 15 depositions in 11 western states and the District of Columbia. The admitted purpose of these depositions was to demonstrate that NWF could not prove standing to bring this action. NWF moved for a protective order, arguing that its affidavits demonstrated its standing and, therefore, additional discovery as to this issue would be unreasonably cumulative within the meaning of Fed. R. Civ. P. 26(c)(1). The District Court agreed and issued the requested protective order. Pet. App. 170a.

As noted, NWF's complaint had also alleged that it was injured in its own right, as an organization, by its inability: (1) to obtain information on the Government's Program and the actions completed under its aegis, and (2) to participate in the Government's decision-making. JA 12. In support of these allegations, NWF submitted in May 1986 the sworn declaration<sup>16</sup> of Lynn A. Greenwalt, then its Vice President for Resources Conservation. Pet. App. 193a.

Greenwalt's declaration, also discussed in more detail below, demonstrated how NWF had been injured in its own right, as opposed to in its representational capacity. NWF had been deprived of vital information about, and an opportunity to participate in, the decisions regarding the Program, and it would be financially harmed by its inability to carry out the tasks its members paid it to perform. Pet. App. 193a-194a.

Upon finding that NWF was likely to succeed on the merits, the District Court enjoined the Government's Program in December, 1985. Pet. App. 131a, 184a.

NWF moved for summary judgment on June 23, 1986. In its cross-motion filed in September 1986, the Government raised the standing issue in regard to the entire amended complaint.<sup>17</sup>

In December 1987, the Court of Appeals sustained the District Court's preliminary injunction, noting that

the affidavits [of Peterson and Erman] specifically identify locations where [NWF's] members' interests are threatened by the [Government's] actions in lifting restrictions on mining and other forms of natural resource exploitation. Indeed, according to the [Government], mineral claims have already been

<sup>16</sup> "Affidavit" and "declaration" are sometimes hereinafter used interchangeably. See 28 U.S.C. § 1746.

<sup>17</sup> No defendant challenged the standing of the congressional intervenor.

staked in an area in which one member uses and enjoys the resources. [Pet. App. 80a.]

Judge Williams, concurring with the panel's opinion on the standing issue, applied a summary judgment standard but nevertheless concluded that

the issue of standing is largely academic. \* \* \* By the time the case was submitted to this court, the defendants appear to have conceded the bare minimum necessary for standing. [Pet. App. 85a.<sup>18</sup>]

On July 22, 1988, the District Court heard oral argument on both motions for summary judgment. ER 138. At the close of argument, the District Court ordered the case submitted except as to standing and requested additional memoranda from both sides on that issue. ER 110, 227-228. NFW filed a memorandum on its standing that included five supplemental affidavits. Oppcert. App. 1-17. These declarations were made by members of NWF who use specific federal lands in five Western states that have been affected by the Program and whose continued use and enjoyment of those lands are thereby threatened.

NWF member David Doran's declaration details his extensive recreational activities on the federal lands near Coos Bay, Oregon. On April 24, 1984, pursuant to the Program, the Government terminated two protective withdrawals and opened to disposal under the public land laws over 1500 acres of land on which Doran recreates. Oppcert. App. 2; 49 Fed. Reg. 17,502 (1984). The Government proposes to dispose of these lands for the "development of a marine industrial park." Ct. App. JA 145-147. As a result, lands which currently provide habitat for the endangered snowy plover and peregrine falcon, and provide birdwatching opportunities for Doran, will be cleared and paved. Oppcert. App. 2.

NWF member Merlin McColm resides in Elko, Nevada, and uses many public lands in Nevada for recreation.

<sup>18</sup> In April 1988, the Court of Appeals denied petitions for rehearing. Pet. App. 116a.

Areas adjacent to the Roberts and Tuscarora Mountains frequented by him have been opened to mining and other forms of development under the Program. Oppcert. App. 5; *see also*, 47 Fed. Reg. 7,236 (1982); 47 Fed. Reg. 6,851 (1982). He has already observed the ecological damage stemming from these actions in the form of "sedimentation from mining runoff and direct habitat destruction." Oppcert. App. 5.<sup>19</sup>

NWF member Stephen Blomeke is an avid hunter and travels "considerable distances across the state of Colorado to access areas containing prime habitat" for game species. Oppcert. App. 8. In doing so, he uses numerous federal campgrounds and recreation areas. *Id.* Pursuant to the Government's Program, many of these public areas have been opened to disposal and development. *Id.* at 8-10; *see also* 47 Fed. Reg. 7,414-23 (1982). Prior to the issuance of the now-vacated injunction in this case, 25 mining claims already had been staked on campgrounds frequented by Blomeke. JA 82.

NWF member Will Ouellette lives in rural New Mexico and uses the federal lands in the surrounding countryside almost on a daily basis. Oppcert. App. 11-13. Many of the areas he uses, including the Tent Rocks Recreation Area, have been opened to disposal and development by the termination of protective land classifications. *Id.* at 12-13. The Tent Rocks area of New Mexico is a unique environment. "Comparable formations are found only in Turkey."<sup>20</sup> Yet the Government terminated the classifications that protected these lands for public enjoyment

<sup>19</sup> According to Government submissions, three mining claims have been staked on 80 acres previously protected by these withdrawals. JA 82. All three were staked the year the lands were opened, and no claims were staked the previous two years. *Id.*

<sup>20</sup> Bureau of Land Management, *Draft Rio Puerco Resource Management Plan and Environmental Impact Statement* at C-30 (1985) (attached as App. III to Ouellette Declaration, Oppcert. App. 11).

and recreation, to the detriment of Ouellette as well as many others.

In addition, NWF member Peterson supplemented her earlier affidavit and identified in detail the challenged actions responsible for her injury. She provided an example of a specific proposal to develop a uranium mine on lands which previously had provided her with wildlife habitats for hiking, camping, hunting, and fishing. Oppcert. App. 15-17.

On November 4, 1989, the District Court summarily rejected NWF's supplemental affidavits as untimely, reversed its previous rulings on NWF's standing, granted summary judgment to the Government on the issue of standing, dissolved the preliminary injunction, and dismissed the entire case, including the unheard claims of Congressman Vento. Pet. App. 26a-37a, 158a.

NWF appealed. A three-judge panel of the Court of Appeals unanimously reversed the holding of the District Court on three separate and alternative grounds:

(1) the affidavits initially submitted by NWF in support of its motion for summary judgment "clearly alleged facts showing that its members were 'among the persons injured' " by the Government, Pet. App. 15a;

(2) because these same affidavits had provided "adequate grounds for NWF to establish irreparable harm" for a preliminary injunction, they also demonstrated sufficient injury-in-fact to meet the test of standing, so that the Court of Appeals' previous opinion upholding the preliminary injunction established the law of the case on this issue, *id.* at 19a, 24a; and

(3) "[t]he law of this circuit" allowed NWF to file the supplement affidavits, and it was an abuse of discretion for the District Court to refuse the filing in light of the equities of the case; NWF's supplemental declarations "easily satisfy the level of

specificity needed for standing under any of the Supreme Court's articulated tests." *Id.* at 21a.

The Court of Appeals then remanded the case for disposition on the merits. Because it directed the District Court to address NWF's substantive claims "with dispatch," the Court of Appeals found it unnecessary to reinstate the preliminary injunction. *Id.* at 24a-25a. Thus, at this time, the Government's Program is proceeding apace,<sup>21</sup> without an EIS, the regulations mandated by Congress, complete RMPs, meaningful public participation, or the statutory referrals to Congress and the President.

### SUMMARY OF ARGUMENT

The decision below is fully consistent with that court's practices concerning proof of standing and with this Court's precedents on the substantive requirements for standing.

1. The decision rests on a ground so unimportant and noncontroversial that we respectfully submit that the Court should dismiss the writ as improvidently granted. As an independent basis for its holding, the Court of Appeals determined that the District Court had abused its discretion in refusing to consider respondent's supplemental affidavits, which "easily satisfy the level of specificity for standing under any of the Supreme Court's articulated tests." Pet. App. 21a. The decision that the District Court abused its discretion was based on the D.C. Circuit's longstanding practice of allowing supplementation of the record where standing questions are raised, and vindicated the interests of fundamental fairness where the Government itself submitted supplemental evidence on the standing question and the District Court had requested an additional filing. There are no special and important reasons for this Court to review the determination that, in these circumstances, the District Court abused its discretion, and accordingly the writ should be dismissed.

<sup>21</sup> See e.g., 55 Fed. Reg. 4,838 (1990); 55 Fed. Reg. 2,886 (1990).

Alternatively, the Court should affirm the judgment below because the Court of Appeals correctly determined that the District Court abused its discretion.

The Government will not be harmed by such a dismissal or affirmance on the alternative ground. Indeed, because the injunction originally issued by the District Court is no longer in effect, the Government's Program continues unimpeded. A dismissal or affirmance will operate only to remand the legal issues to the lower courts for determination.

2. Alternatively, the Court of Appeals was correct in upholding respondent's standing on the basis of the evidence in the record at the time of the District Court's decision. NWF's representational standing was established by the Peterson and Erman affidavits read together with the Government's own evidence. The record as a whole plainly demonstrates that these NWF members recreated in areas that were illegally opened to commercial interests, including mining, and that their use and enjoyment of these lands were thereby adversely affected. This Court's cases require no more.

3. Finally, NWF submits that it has standing on its own account, quite apart from its representational standing considered below. Because of its alternative holdings, the Court of Appeals did not reach this question. At a minimum, the case should be remanded to the Court of Appeals for its finding in the first instance as to whether NWF has standing in its own right.

## ARGUMENT

### I. THE WRIT SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

NWF respectfully submits that the writ of certiorari should be dismissed as improvidently granted.

The Court of Appeals reversed the District Court on three separate and distinct grounds.<sup>22</sup> If any of them were proper, the judgment would have to be affirmed. *See, e.g., The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959).

One of these independent grounds was that the District Court had improperly refused to consider the five supplemental affidavits filed by NWF in response to the District Court's request for supplemental memoranda on the standing issue. "The law of this circuit," the court held, allows the plaintiff to supplement the record to cure alleged defects in standing. Pet. App. 21a. The court pointed out that "[n]o party to this litigation seriously disputes that NWF's supplemental affidavits, if considered, easily satisfy the level of specificity for standing under any of the Supreme Court's articulated tests." *Id.*<sup>23</sup> Therefore, the court held, the District Court had abused its discretion in refusing to allow NWF to supplement the record with affidavits that demonstrate beyond question standing on behalf of NWF's members and, thus, on behalf of NWF.

<sup>22</sup> The Court of Appeals repeatedly made clear that these were alternative holdings, any one of which justified reversal. Pet. App. 18a, 20a, 21a ("Thus, even if the original affidavits were insufficient and even if we assume that this court's [prior] decision \* \* \* did not decide the issue, these supplemental affidavits offer enough detail to establish NWF's standing"), 24a.

<sup>23</sup> The Acting Solicitor General states that the Government contested the sufficiency of these affidavits before the Court of Appeals. Petrs. Br. 40 n.30. It is significant, however, that he does not do so before this Court. Nor could he. As set forth in the Statement, *supra*, these affidavits were specific, and their contents were largely corroborated by the Government's own evidence.

1. This Court has recognized that federal courts have the inherent power to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R.*, 370 U.S. 626, 630-631 (1962).<sup>24</sup> They may also declare the law peculiar to their own jurisdictions, usually without interference by this Court.<sup>25</sup> Here, the D.C. Circuit has exercised its inherent powers and declared that under the well-established law of the Circuit,<sup>26</sup> it was an abuse of discretion for the District Court to refuse to consider these affidavits.

Moreover, even if this were not a matter of local practice, the decision below fully accords with the spirit of

<sup>24</sup> In *Link*, this Court upheld the local practice of dismissing complaints for lack of prosecution without providing prior notice and hearing. *See also* 28 U.S.C. § 2071 (granting federal courts power to prescribe rules consistent with Acts of Congress and this Court's rules); Fed. R. Civ. P. 83 (establishing District Courts' power to issue rules); *Frazier v. Heebe*, 482 U.S. 641, 645 (1987); quoting *In re Buffalo*, 390 U.S. 544, 554 (1968) (White, J., concurring) (citation omitted) (lower courts have discretion to adopt local rules that are necessary to carry out the conduct of business so long as those rules are consistent with "the principles of right and justice").

<sup>25</sup> "This Court has long expressed its reluctance to review decisions of the courts of the District [of Columbia] involving matters of peculiarly local concern, absent a constitutional claim or a problem of general federal law of nationwide application. *See, e.g., Griffin v. United States*, 336 U.S. 704, 717-718 (1949); *Fisher v. United States*, 328 U.S. 463, 476 (1946). *See also Miller v. United States*, 357 U.S. 301, 306 (1958)." *Pernell v. Southall Realty*, 416 U.S. 363, 366 (1974). *See also Selva v. Collins*, 58 U.S.L.W. 4221, 4222 (U.S. Feb. 21, 1990); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

<sup>26</sup> *See National Wildlife Fed'n v. Hodel*, 839 F.2d 694, 703 (D.C. Cir. 1988); *Wilderness Soc'y v. Griles*, 824 F.2d 4, 17 n.10 (D.C. Cir. 1987); *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165, 1169 (D.C. Cir. 1986); *Health Research Group v. Kennedy*, 82 F.R.D. 21, 28 & n.11 (D.D.C. 1979). *See also DKT Memorial Fund, Ltd. v. Agency for Int'l Dev.*, 810 F.2d 1236, 1239 (D.C. Cir. 1987) (granting plaintiff's motion to amend its complaint to cure alleged defect in standing where plaintiff moved to amend during oral argument).

this Court's rulings<sup>27</sup> and with those of other lower courts.<sup>28</sup>

2. Perhaps most importantly, the Government improperly invokes Rule 56 for the proposition that NWF was too late in filing the five additional affidavits after the

<sup>27</sup> See *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 112-113 n.25 (1979) (District Court permitted to allow amendment of complaint by parties who did not reside within the neighborhood where harm was done); see also *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377-379 (1982) (plaintiffs allowed on remand to make more definite allegations in complaint relating to injury); see also *id.* at 382-383 (Powell, J., concurring); *Gladstone, Realtors*, 441 U.S. at 114-115 & n.31; *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (trial court can allow plaintiff to supply, by amendment to complaint or affidavits, further particularized allegations as to standing); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689-690 n.15 (1973) (doubts about standing can be resolved by motions for more definite statements and further evidence); *Sierra Club v. Morton*, 405 U.S. 727, 735-36 n.8 (1972) (plaintiff can seek in District Court to amend its complaint to show use of areas where harm occurred). In fact, even in a mootness context, this Court has recently indicated that an affidavit submitted after argument in this Court could be considered, with appropriate controverting submissions by opposing parties, in the Court of Appeals or in the District Court after remand. *Lewis v. Continental Bank Corp.*, 58 U.S.L.W. 4330, 4332-33 (U.S. Mar. 5, 1990).

<sup>28</sup> Courts of Appeals that have considered supplemental affidavits outside the standing context have held that a trial court may not dispose of a case on summary judgment without giving each party an opportunity to submit their respective supporting and answering affidavits, and to supplement them if need be. *E.g., Brobst v. Columbus Serves, Int'l*, 761 F.2d 148, 154 (3d Cir. 1985), *cert. denied*, 108 S. Ct. 777 (1988); *Alghanim v. Boeing Co.*, 477 F.2d 143 (9th Cir. 1973).

Several trial courts have addressed the supplemental affidavit issue in the standing context. See, *e.g., Sierra Club v. Marsh*, 701 F. Supp. 886, 903 (D. Me. 1988) (refusing to convert motion to dismiss into motion for summary judgment where court was not satisfied that all parties had presented pertinent materials on standing); *Shokman v. Democratic Org.*, 560 F. Supp. 863, 865 n.2 (N.D. Ill. 1983) (defendant's contention that plaintiff lacked standing was mooted by plaintiff's supplemental affidavit).

July 22, 1988 hearing before the District Court. Ptrs. Br. 39-40. What the Government fails to tell the Court is that at the hearing itself, without prior notice to NWF, the Government introduced a five-page exhibit detailing the status of various RMPs for areas in the 11 affected States, including the Arizona Strip and the Green Mountain area already addressed by NWF, and the Coos Bay, Oregon area subsequently addressed by one of the five affidavits.<sup>29</sup>

Thus, two points are evident. First, the Government cannot complain about an alleged tardiness under Rule 56 when it violated the Rule itself under its own interpretation. It would be wholly unfair—and in fact a violation of fundamental rights—for the Government to spring this evidence on NWF at the hearing and then prevent it from filing counter-evidence. In *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 410 (1st Cir. 1985), a case directly on point, the First Circuit held that while the trial court had discretion to admit supplemental affidavits, it abused its discretion in allowing one party to submit supplemental affidavits on the day of the hearing while denying the same opportunity to the other.

Second, the District Court itself invited additional submissions. It is quite true that the court referred to supplemental "memoranda," ER 227-28; see also ER 110, but in light of the fluid state of the record, with the Government filing data even at the hearing itself, it was not unreasonable, particularly in light of the law in the Circuit, to interpret this order as permitting the submission of additional affidavits.

Although a District Court does have, under Fed. R. Civ. P. 56, "a measure of discretion in determining whether [a] summary judgment motion is ripe for resolu-

<sup>29</sup> The Government's exhibit, reproduced as Appendix B to this brief, was marked as Federal Exhibit 1 and made a part of the record. ER 228. The Government wrote counsel for NWF under date of July 22, 1988: "As directed by the Court, I am providing you with a copy of the exhibit submitted to the court by the Government on July 22, 1988"—that is, that same day.

tion,'"<sup>30</sup> that discretion also can be abused.<sup>31</sup> Here, NWF's affidavits were not out of time in light of the Government's own filing that was itself out of time.

3. There are here no "special and important reasons" for this Court to review the Court of Appeals' treatment of the particular circumstances under which the District Court refused to consider supplemental affidavits in support of standing. *See* Sup. Ct. R. 10.

It has been this Court's longstanding practice to dismiss certiorari when it becomes apparent that the case turns upon review of a question which "would be of no importance save to the litigants themselves."<sup>32</sup> This case depends solely on the scope of a trial court's authority under particular factual circumstances and under D.C. Circuit practice. The decision below was expressly based on the "equities of this case." Pet. App. 21a. In reaching that decision, the Circuit Court considered the Government's opportunity to refute the supplemental affidavits and the fact that prior to the trial court's request for supplemental memoranda, NWF had no reason to doubt the adequacy of the affidavits it had already submitted. To review the Court of Appeals' decision, this Court would first have to revisit these issues and thereby decide ques-

<sup>30</sup> *Childers v. Joseph*, 842 F.2d 689, 693-694 n.3 (3d Cir. 1988), quoting *Sames v. Gable*, 732 F.2d 49, 51 (3d Cir. 1984).

<sup>31</sup> *Glen Eden Hosp. v. Blue Cross & Blue Shield*, 740 F.2d 423, 428 (6th Cir. 1984); *Sam Wong & Son, Inc., v. New York Merc. Exch.*, 735 F.2d 653, 678 (2d Cir. 1984); *Sames*, 732 F.2d at 51-52.

<sup>32</sup> *Rudolph v. United States*, 370 U.S. 269, 270 (1962). Thus, the Court has dismissed certiorari when it appeared that rather than presenting a constitutional issue, the case turned on "the discretion which the trial court was entitled to exercise." *Moor v. Texas & N.O. R.R.*, 297 U.S. 101, 105 (1936); *cf. Rudolph*, 370 U.S. at 270 (dismissing certiorari where case turned on Court of Appeals' findings of ultimate fact); *Southern Power Co. v. North Carolina Pub. Serv. Co.*, 263 U.S. 508, 509 (1924) (dismissing certiorari where the controverted question was primarily a question of fact).

tions that are of interest only to the parties to this litigation.

A dismissal of the writ would be particularly appropriate in this case, where the Government seeks no reversal of established law, or of such cases as *SCRAP*. Nor does it ask the Court to promulgate a new rule or a new approach in regard to standing. It merely questions the application of controlling law to the particular facts of this case.

Although "law of the case"—the Court of Appeals' second ground of reversal—may not technically apply at this stage of the proceeding because this Court remains free to determine standing for itself, there is a large element of potential unfairness at play here. On a number of occasions prior to the July 22, 1988 hearing, the courts below either specifically held that NWF had standing or assumed that it did.<sup>33</sup> When the Government attempted to take discovery on the issue, NWF opposed it solely on the ground that it had already submitted sufficient evidence on standing, and the District Court agreed. Pet. App. 170a. If the District Court had thought standing was a live issue, it would have permitted discovery. NWF filed the additional affidavits as soon as it learned at the

<sup>33</sup> For example, the Government originally challenged standing only in regard to a single count in the amended complaint. *See* Pet. App. 130a. Later, on February 10, 1986, the District Court, in denying a Government motion to reconsider the entry of a preliminary injunction, "reaffirm[ed] plaintiff's standing to bring this action." Pet. App. 140a. On July 14, 1986, the District Court quashed Government subpoenas designed to test some aspects of NWF's standing. Pet. App. 170a. And on December 11, 1987 (as amended, December 15, 1987), the Court of Appeals specifically held that NWF had standing because the Peterson affidavit demonstrated irreparable harm to NWF. Pet. App. 38a, 48a-57a.

July 22 hearing that the District Court was seriously questioning standing for the first time.<sup>34</sup>

In summary, the petition should be dismissed as improvidently granted because a separate, alternative ground for the ruling below is peculiarly one for a lower court to decide and to which this Court should pay deference. In the alternative, the Court should affirm the decision below as a correct application of general law to the facts of this case.

4. No harm will come to federal interests from such a dismissal or affirmance on this alternative ground. Both in its facts and in its argument, the Government leads this Court to believe that irreparable injury will befall such interests if the decision below is not reversed. In fact, no injury of any kind to federal interests will follow.<sup>35</sup> The injunction originally issued by the District Court is no longer in effect, *see* Pet. App. 24a-25a, 158a, and the efficacy of that injunction is not before the Court. The Government is free to pursue—and, in fact, is pursuing—its Program of terminations, and federal lands continue to be opened to mining and other commercial interests. A remand for a trial on the merits would not in any way disturb the status quo; it would only allow the District Court to determine, finally, whether the Government has violated and is continuing to violate the law in its Land Withdrawal Review Program, or whether that Program can proceed apace.

The District Court on remand does *not*, as the Government says, have to become involved in hundreds of in-

<sup>34</sup> In fact, it is not too late for the Government to pursue discovery now, if the Court were to find it necessary to remand the case. *Cf. Wilderness Soc'y v. Griles*, 824 F.2d at 20-21.

<sup>35</sup> Moreover, we would respectfully remind the Court that standing "in no way depends on the merits of the [claim]." *ASARCO, Inc. v. Kadish*, 109 S. Ct. 2037, 2049 (1989), quoting *Warth*, 422 U.S. at 500.

dividual decisions. NWF is not challenging these decisions individually. The terminations were all completed pursuant to what the Government itself, time and again, has denominated as a single "Program."<sup>36</sup> The Court of Appeals held that it was a single Program. Pet. App. 55a-56a. It is this Program, not the individual orders, that NWF is challenging.

NWF simply seeks to reinstate prior agency decisions until the statutorily-mandated procedure has been followed. For example, if, as NWF contends and as the District Court held, Pet. App. 132a, FLPMA mandates RMPs as a matter of law precisely because of the additional information and findings, including EISs, required in RMPs, the District Court need never decide whether some other form of documentation met some unprescribed "equivalency" test.<sup>37</sup> Similarly, the District Court need only decide whether the Act requires that Congress and the President be notified before a program of terminations goes into effect, because clearly no such notification took place here. And further, the District Court must decide whether the Act requires public notice of, and the opportunity for participation in, the Program, and whether those requirements were met—not as to each parcel of land but for the Program as a whole. As the

<sup>36</sup> Pl. Exs. 1, 2, 3, 11, 17, 20, 70; 1B Edwards Aff. Ex. 21B; 1C Edward Aff. Ex. 8, JA 51.

<sup>37</sup> Moreover, this record shows that MFPs do *not* set forth all of the information contained in RMPs. JA 193-194. In fact, the inadequacy of MFPs is established by the Government's own reports: *e.g.*, General Accounting Office Report, *The Bureau of Land Management's Efforts to Identify Land for Disposal* (April 18, 1985), at 15; Office of Technology Assessment, *Environmental Protection in the Federal Coal Leasing Program* (1984), at 44, 56, 70, 72, 74-75, 78; General Accounting Office, *Minerals Management at the Department of the Interior Needs Coordination and Organization* (EMD 81-53, June 5, 1981), at 56; American Society of Planning Officials, *Improving the Bureau of Land Management Planning Process* (May 1979), at 5-7, 8-13, 26.

District Court put it in 1985: NWF seeks to enforce "full compliance with the laws governing management of the public lands." Pet. App. 144a.

These are purely legal decisions, followed by narrow and relatively simple factual conclusions.<sup>38</sup> Even the Acting Solicitor General concedes that a federal court may "articulate a ratio decidendi that would have precedential implications for similar disputes." Ptrs. Br. 35. That is precisely what we seek here. There is nothing site-specific about the legal rulings being sought. Nor are they appropriate for decision now, but only after remand. The situation is thus comparable to that in *International Union v. Brock*, 477 U.S. 247, 287 (1986), where this Court found that the Secretary of Labor and the Court of Appeals had both misconstrued petitioners' claims:

Neither these claims nor the relief sought required the District Court to consider the individual circumstances of any aggrieved UAW member. The suit raises a pure question of law: whether the Secretary properly interpreted the Trade Act's TRA eligibility provisions. [<sup>39</sup>]

For similar reasons, NWF need not demonstrate on remand that its members have standing in *each* of the areas covered by each classification and withdrawal termination. Such a result would run directly counter to this

<sup>38</sup> The Government conceded to the District Court that "the same procedures" were used throughout the 17 states, ER 208, and that court held in 1985 that "The essence of plaintiff's claim is legal: The exercise of agency discretion and expertise and the development of a factual record would not be helpful or necessary to decide this legal issue." Pet. App. 142a. The legal issue remains the same today.

<sup>39</sup> For other examples of programmatic attacks, see *Watt v. Energy Action Found.*, 454 U.S. 151; *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970).

Court's decisions.<sup>40</sup> Since NWF attacks the Program, and one or more of its members has been injured in a site where the Program is being carried out, that is all that will be required.

## II. ALTERNATIVELY, NWF HAS STANDING IN ITS REPRESENTATIONAL CAPACITY

Even if the Court were to disagree with the analysis above, NWF has standing in this case, and the judgment below should be affirmed on that basis.

The Argument portion of the Government's brief reads as though Peterson is the plaintiff/respondent here. To the contrary, the plaintiff/respondent—the party whose standing is at issue—is NWF. As an association, NWF can have standing on either a representational basis, or on its own. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 345 (1977); *Warth*, 422 U.S. at 511. Here, NWF has both.

The Court of Appeals correctly held, Pet. App. 19a, that the first Peterson affidavit alone was sufficient to support the representational standing of NWF, which need only show that any one of its members is suffering injury.<sup>41</sup> Other evidence—specifically, the Erman affidavit, Pet. App. 187a, read together with the Government's own submissions—further proves NWF's standing.

An association can sue in a representational capacity on behalf of its members so long as its members would

<sup>40</sup> E.g., *Brock*, 477 U.S. at 281-287; *Warth*, 422 U.S. at 490; *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 206, 209-212 (1972); *Sierra Club v. Morton*, 405 U.S. at 737, 740 n.15.

<sup>41</sup> *Bowen v. Kendrick*, 108 S. Ct. 2562, 2580 n.15 (1988); *Watt v. Energy Action Educ. Found.*, 454 U.S. at 160; *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977); *Buckley v. Valeo*, 424 U.S. 1, 12 (1976); *Warth*, 422 U.S. at 511 (an "association must allege that its members, or any one of them, are suffering immediate or threatened injury"); *Baker v. Carr*, 369 U.S. 186, 204 n.23 (1962).

otherwise have standing to sue, the interests it seeks to protect are germane to the association's purposes, and the participation of individual members is not required. *Brock*, 477 U.S. at 281-282, 286-288; *Hunt*, 432 U.S. at 343; *Warth*, 422 U.S. at 511.

There can be no question but that the last two of these requirements have been met, and the Government does not argue otherwise.<sup>42</sup> Therefore, the sole issue on representational standing is whether this record sufficiently shows that one or more NWF members have standing—that is, whether NWF has demonstrated that a single member is suffering a personal injury fairly traceable to the Government's challenged conduct.<sup>43</sup> Here, this injury has been shown by both Peterson and Erman.

#### A. The Peterson affidavit.

The Government attempts to isolate the Peterson affidavit from all other evidence in the case and then selectively cites only a few phrases from it. But that is not how standing is determined, particularly at the summary judgment stage. As this Court has admonished, the entire

<sup>42</sup> The interests NWF was founded and chartered to protect—the public interest in safeguarding wildlife habitats and in protecting the recreational value and aesthetic beauty of federal lands from desecration—are precisely the ones at issue here. In addition, a cornerstone of NWF's representational activity is to gather and disseminate the very information the Government has failed to create. Finally, the District Court did not rule, and the Government does not claim, that NWF's 4.5 million members and supporters are necessary parties to this suit.

<sup>43</sup> The injury must also be redressable by the relief sought. That requirement is not in question here. If the District Court ultimately rules in favor of NWF, its order will largely remedy the harm already done to NWF and its members, obviate the harm that still threatens them, and provide NWF with participation and with the information it needs to carry out its legitimate functions. See *Public Citizen v. U.S. Dep't of Justice*, 109 S. Ct. 2558, 2564 (1989).

record must be considered. *Celotex Corp.* 477 U.S. at 324; see also *Gladstone, Realtors*, 441 U.S. at 109 n.22; Fed. R. Civ. P. 56(c). In this case, the Peterson affidavit was sufficient but, in addition, the Government itself proved through its own submissions that Peterson and other NWF members enjoy standing.

The Peterson affidavit, Pet. App. 190a, specifically referred to the instant lawsuit, which Peterson correctly described as having been brought to contest the “unlawful terminat[ion of] protective land use classifications and other withdrawals on federal lands pursuant to [the Government's] Land Withdrawal Review Program.” Par. 5. Peterson alleged that her interests had been adversely affected by these “unlawful actions,” par. 6, and thus made clear that the events and the harm described in her affidavit related to the Government's terminations—that is, that the lands affected by such terminations were the lands about which she was complaining. She pointed out, for example, that before terminating withdrawals and classifications, the Government had failed to provide notice and opportunity for public involvement, thereby depriving her of the opportunity to participate in management decisions, as she had done with the draft Lander, Wyoming RMP. Pars. 4, 8.<sup>44</sup>

Peterson's affidavit demonstrates that it was not simply as a member of the general public that she was harmed. Instead, Peterson actually used these lands for recreational purposes and enjoyed their aesthetics. Par. 3. Peterson asserted that her “recreational use and aesthetic enjoyment” depended upon management and enhancement by the Government, par. 4, and had therefore been adversely affected by the Government's unlawful actions. Par. 6.<sup>45</sup> These adverse effects, she said, would be redressed by a favorable decision in the case. Par. 9.

<sup>44</sup> See n.56, *infra*.

<sup>45</sup> Parties have standing to protect not only their economic interests but their aesthetic, conservational and recreational interests

Peterson then gave a specific example of adverse impact—an example that placed her squarely within the area affected. She alleged that she particularly used lands in the vicinity of South Pass-Green Mountain, Wyoming, an area the Government has “opened to the staking of mining claims and oil and gas leasing.” Par. 6. This opening, she claimed, “threatens the aesthetic beauty and wildlife habitat potential of these lands,” *id.*,—the very characteristics on which her enjoyment of the land depended.

The Government has totally confused the situation in regard to the South Pass-Green Mountain areas by its repeated references to two million acres. *E.g.*, Ptrs. Br. 30, 33, 35. Its own evidence demonstrates that it had previously designated for retention as public lands some two million acres in Fremont and Natrona Counties, Wyoming *before* the terminations began. (These two million acres included lands in the South Pass and Green Mountain areas as well as other lands.) However, the Government *closed* only about 6000 of the two million acres to mining and mineral leasing. These 6000 acres were in the South Pass-Green Mountains areas. The Government thereafter terminated—or opened to mining and to oil and gas development—4455 of the 6000 acres. Def.-Int. Ex. 7, p. 2; JA 132-133.

In this context, it is clear that Peterson was referring to the 4455 acres when she swore that she used the South Pass-Green Mountain areas and was injured by the unlawful terminations. Her affidavit directly tied her to the unlawful “terminating,” par. 5, to the Government’s proposal “to terminate classifications and other withdrawals,” par. 8, and to the Government’s failure to “pre-

as well. *Havens Realty Corp.*, 455 U.S. at 379 & n.20; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 73-74 & n.18 (1978); *SCRAP*, 412 U.S. at 687; *Camp*, 397 U.S. at 154.

serv[e] and protect[]” these particular federal lands. Pars. 4, 7, 8, 9. She further referred to the South Pass-Green Mountain area “opened” to mining, par. 6, which can *only* mean the 4455 acres—the area opened to mining.

The Government makes too much of Peterson’s allegation that she recreated “in the vicinity of” the South Pass and Green Mountain areas.

First, a specific pass is named “South Pass” and a specific mountain is called “Green Mountain”, but the lands at issue here are those surrounding, or in the vicinity of, these particular spots, as the Government’s own evidence shows. *E.g.*, JA 124. Peterson was not attempting to locate herself in the bottom of the pass or on top of the mountain, so it is not surprising that she would designate the affected lands which she uses as “in the vicinity of” these particularized places.

The Government can hardly feign confusion over what these lands are, or contend that they have not been impacted by terminations. In response to NWF’s request for the Administrative Record of Classifications and Withdrawals, the Government produced on November 4, 1985, case file No. W6228, the file on the South Pass-Green Mountain area. JA 132. Government affidavits and exhibits speak repeatedly of the South Pass and Green Mountain areas,<sup>46</sup> or “the Green Mountain-South Pass area.” *E.g.*, JA 137. According to the Government, the South Pass area is “an important recreation area” where people come to fish, hunt and camp, JA 124, and the Green Mountain area is “noteworthy” for, among other things, its deer, elk herds and recreation. *Id.* The Government’s evidence is replete with references to potential adverse impacts on campgrounds, fish, and wild-

<sup>46</sup> One Government affiant not only described these areas, JA 123-124, but recited how the decisions were made to revoke withdrawals and classifications on them because of uranium and mining interests. *E.g.*, JA 132-137.

life habitats in these areas, as well as on visual or scenic resources there.<sup>47</sup>

Second, the harm that comes from mining—whether it be for oil, gas, uranium, silver, gold, copper, zinc or agate—is not localized. Landscapes are obscured for great distances; fugitive dust is created and goes where the wind goes; contaminated water flows for miles; blasting violates noise levels, causes wildlife to move, and affects wildlife mating habits over great distances; and cyanide poured over heap leach piles after strip-mining kills fish far downstream.<sup>48</sup> So even if Peterson's affidavit were

<sup>47</sup> *E.g.*, JA 133-134, 136-137; Pl. Ex. 61 at 228; Def.-Int. Ex. 7; see also ER 193.

<sup>48</sup> One EIS published by the Government in 1988 spent 15 pages discussing the cumulative impacts of oil and gas development on public lands. U.S. Dept. of the Int., BLM, Final West HiLine Resource Management Plan Environmental Impact Statement (1988), at A-41-A-55. This document demonstrated that, among other things, air quality is affected by the creation of dust, the emissions from internal combustion engines, and the burning of waste petroleum products, *id.* at A-41; soils are affected by surface disturbances, soil compaction, and the spilling of fluids, including oil and salt water, *id.* at A-42-A-43; surface water quality is impacted by erosion, sedimentation, and accidental spills, while ground water is affected by seismic exploration, causing cross contamination of aquifers, reduced water yields, and lowered static water levels, *id.* at A-43-A-44; vegetation is destroyed by the construction of seismograph trails, drainage crossings, drill pods, roads, pipelines and other facilities, *id.* at A-45-A-46; livestock grazing is impacted by a loss of forage, *id.* at A-46; big game, upland game birds, waterfowl, small animals, endangered species, and fisheries are all threatened by everything from loss of forage, the disturbance of breeding cycles through drilling, the destruction of food by oil spills and of nests by drilling, to the release of toxic substances into water, *id.* at A-46-A-49 ("All stages of oil and gas operations directly affect wildlife"); recreation such as hunting, fishing, sightseeing, hiking, camping and boating, as well as aesthetics, are affected by dust, noise, noxious fumes, new roads, erosion, the destruction of cultural resources and natural settings, and the disturbance to wildlife, *id.* at A-49-A-51; and wilderness values are adversely impacted by seismic exploration, *id.* at A-52.

interpreted to aver injury-in-fact to a person recreating in the "vicinity" of lands being opened to desecration, that would be entirely appropriate.<sup>49</sup>

This Court has not heretofore had difficulty construing phrases like "in the vicinity of" in standing cases—particularly in the environmental context.<sup>50</sup> For example,

<sup>49</sup> This is particularly true in light of the District Court's holding in 1985 that any allowance of mining or leasing

can permanently destroy wildlife habitat, air and water quality, natural beauty and other environmental values. [The Government's] suggestion that [NWF's] members can still hike, fish and otherwise enjoy these lands ignores both aesthetic interests and the process whereby a holder of a mining claim can gain the right to exclusive possession. Similarly, [the Government's] calculations limiting the acres that have actually been leased or mined demonstrates nothing about the future impact of their actions. Without the preliminary injunction, [the Government's] termination of classifications and withdrawals could lead to the permanent loss of lands to public use and enjoyment—an injury we feel would be irreparable. [Pet. App. 135a (footnote deleted).]

<sup>50</sup> The lower courts have also treated "in the vicinity of" as sufficient for standing purposes in environmental cases. For example, in *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 823 n.10 (D.C. Cir. 1976), the court upheld a District Court finding that a party who owned land "in the vicinity of" a submarine support facility had standing to challenge construction at the facility. And in *Coalition for the Env't v. Volpe*, 504 F.2d 156, 163-164 (8th Cir. 1974), the court held that plaintiffs who lived "in the immediate vicinity of" a proposed development project had standing to contest the project, treating as sufficient the allegation that individual and member plaintiffs "reside, work, or pass by the vicinity of the project." See also *Committee for Consideration of Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006, 1015 (4th Cir. 1978) (Butzner, J., dissenting on an issue not reached by the majority). See also *Natural Resources Defense Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 807 (N.D. Ill. 1988) (plaintiffs residing "in the vicinity of Lake Michigan, Waukegan Harbor and the North Ditch" had standing to contest defendant company's discharges into waters); *Sierra Club v. Mason*, 351 F. Supp. 419, 423 (D. Conn. 1972) (Sierra Club members residing "in the vicinity of" a part of

in *Duke Power Co.*, 438 U.S. at 67, some 40 individuals in "close proximity" to a planned power plant were deemed to have standing to challenge the plant's construction. The "environmental and aesthetic consequences" of thermal pollution of two lakes "in the vicinity of" the plaintiffs satisfied the injury-in-fact test. *Id.* at 73-74. And in *SCRAP*, 412 U.S. at 678, a plaintiff who alleged that he used resources "surrounding" the areas where the harm occurred was held to have standing.<sup>51</sup>

Thus, the Peterson affidavit does not require "presumptions" to support standing.<sup>52</sup> Read in its entirety, and particularly in light of the Government's own evidence, it shows that Peterson recreated in an area that was opened to mining without the statutory prerequisites of, *inter alia*, RMPs, prior EISs, and public participation, and that Peterson has thereby been—and continues to be—injured.<sup>53</sup>

Long Island Sound had standing to protest a dredging operation that dumped materials into the Sound).

<sup>51</sup> Although the Court's opinion in *SCRAP* referred to members using resources "in," "of" and "from" the Washington Metropolitan Area, 412 U.S. at 685, 687, 688, the complaint in the case alleged only that the members used the resources "surrounding" that area and at their legal residences—namely, New Haven, Atlanta and Milo, Maine. See *id.* at 678; *SCRAP* Joint App. at 9. The Court obviously considered "in" and "surrounding" interchangeable terms for purposes of standing.

<sup>52</sup> The Government has misstated the Circuit Court's holding in this regard. Rather than applying "free-floating presumptions," as the Government claims, *Ptrs. Br.* 31, the court merely interpreted Peterson's use of the phrase "in the vicinity of" in the context of her entire affidavit. Significantly, the Government does not challenge Peterson's credibility, veracity, or accuracy.

<sup>53</sup> For example, a properly-prepared EIS would have contained at least: (1) a description of the purpose and need for withdrawal and classification terminations; (2) a description of alternatives to the proposed terminations; (3) a description of the lands affected; and (4) a description of the environmental consequences of each

The Government relies heavily on *FW/PBS, Inc. v. Dallas*, 110 S. Ct. 596 (1990). *Ptrs. Br.* 24-25, 29, 31-33 & n.24, 38-39 n.28, 42 n.32. In that case, the statute denied licenses to applicants with former convictions (but only for a specific disability period), and to applicants living with persons whose licenses had been revoked. No one had alleged, much less offered proof, that he or she had been convicted within the disability period or that he or she lived with any one whose license had been revoked. Therefore, there was no standing. 110 S. Ct. at 607-609. Nor was the situation saved by an apparent concession by counsel for the city at oral argument or by an affidavit introduced for the first time in this Court, because the information was not part of the record below. *Id.* at 609-610. That case has no application here. NWF is not relying on evidence submitted for the first time in this Court, and no essential allegation, or evidence in regard thereto, is missing from the record below.<sup>54</sup>

The injury to Peterson's use and enjoyment of lands in the South Pass and Green Mountain area is substantial. In fact, at oral argument before the District Court,

alternative, including, but not limited to, the proposed terminations. 40 C.F.R. §§ 1502.10, .13, .14-.16. (1989)

Properly-prepared land use plans would have included a detailed discussion of "the physical, biological, economic and social effects" of implementing each termination. 43 C.F.R. § 1610.4-6.

The failure of the Government to create these documents prevented both Peterson and NWF from meaningful participation in, and knowledge of, the Program and the resulting terminations.

<sup>54</sup> The Government also relies on *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986), *Ptrs. Br.* 29, 32 n.22, but that case merely stands for the well-established proposition that jurisdiction must be shown by the record, and not by briefs or arguments. In that case, the Court refused to grant standing to a parent who stated at oral argument that he was opposed to prayer on school premises during school hours; there was nothing in the record showing this person's status as a parent or what injury he or his children had suffered. 475 U.S. at 545-547. The situation here is not even remotely comparable.

the Government conceded that some of the Green Mountain area has been opened to uranium mining. ER 194. And although there is no transcript, Judge Williams in dissent on the injunction recited that intervening defendant Mountain States Legal Foundation had conceded in oral argument before the Court of Appeals the existence of changes in mining status of lands described by "the Wyoming NWF member" (Peterson). Pet. App. at 90a n.2.

The record is replete with additional evidence of the impact of the Program on these lands. A Government Mineral Report in 1982 concluded that the Green Mountain area contained accumulations of oil and gas and probably contained uranium deposits as well, Def.-Int. Ex. 7; 43 C.F.R. § 3100.1(1); its geologist concluded in the same year that there was interest in gold mining in the South Pass area, Def.-Int. Ex. 7; on the day these lands were opened, 199 mining claims were staked, *id.*; and prior to the District Court's injunction, 406 mining claims had been staked there and four mines had begun surface disturbing activities.<sup>55</sup> The same Mineral Report declared that underground mining "could have an adverse impact on the crucial moose habitat, deer habitat, some elk habitat, and a variety of small game and bird species"; that "[i]mprovements at campgrounds, as well as land in the immediate vicinity," could either be damaged or destroyed; and that surface disturbances would be even "more extensive." Def.-Int. Ex. 7 (emphasis added); *see also* 49 Fed. Reg. 19,904 (1984).

The environmental injury to the South Pass-Green Mountain area is established by other parts of the record

<sup>55</sup> JA 119. At the hearing before the District Court on July 22, 1988, counsel for NWF said she had just learned that U.S. Energy Corporation was seeking to develop a uranium mine on part of this same land. Ct. App. JA at 259. Peterson's subsequent affidavit confirmed that such a mine permit had been filed. Oppcert. App. 16-17, pars. 7-9.

as well. Under both the draft EIS, which was completed belatedly in the fall of 1985 (almost a year and a half after the South Pass-Green Mountain area had been opened, JA 119), and the final EIS, completed in July of 1986 (over two years after the opening), the Government recognized the substantial harm to wildlife and recreation that could occur in the South Pass-Green Mountain areas.<sup>56</sup> For example, the draft EIS concluded that in the Green Mountain area, "significant long-term impacts to elk and mule deer herds could occur from habitat losses caused by oil and gas activities over the next 60 years," Kelly Aff. Ex. 15 at 226; uranium exploration and development in this area "might cause significant losses of critical winter and winter/yearlong elk and mule deer ranges," *id.* at 228; and "[e]lk and trout populations might be lost entirely." *Id.*; *see also id.* at 230.

As for the South Pass area, "significant acreages of lodgepole pine forest and aspen conifer woodland habitat types could be disturbed, which would cause significant long-term impacts to moose and elk," *id.* at 227; "[i]f gold mining activities continue to erode, these high-value habitats, trout fisheries, the Lander moose herd, the beaver point ecosystems, and the populations of many other wildlife species would suffer significant cumulative negative effects," *id.* at 228; and "[s]ignificant long-term impacts could occur to \* \* \* trout and moose habitat[s] in this area." *Id.* at 230; *see also* Pl. Ex. 61. These are not allegations in the complaint; this is the Government speaking. These are the very same areas where Peterson recreates.

<sup>56</sup> Kelly Aff. Ex. 15. Both the draft and final EISs were for the Lander Resource Area, which includes both the South Pass and Green Mountain "management units." The 1982 South Pass and Green Mountain EA concluded that "[t]here would be extensive short term adverse environmental impacts that would occur during the [mineral] exploration phase \* \* \*." Kelly Aff. Ex. 1. Still the Government completed no EIS *before* opening these lands to mining.

### B. The Erman affidavit.

Like the Peterson affidavit, the Erman affidavit demonstrates that an NWF member suffered significant injury as a direct result of the Government's Program. Pet. App. 187a. Erman, who lives in Phoenix, Arizona, alleged that he uses federal lands—including those in the vicinity of the Grand Canyon National Forest—for recreational purposes and aesthetic enjoyment. Par. 3. He, like Peterson, wanted to participate in decisions affecting these lands, just as he had joined in comments on the plans involving the Tonto National Forest, the Coconino National Forest, and the Lower Gila. Par. 4. The Government failed, however, to provide notice and opportunities for public involvement. Par. 8.


Erman particularly cited the Arizona Strip as having been opened to the staking of mining claims, which in turn "threatens the aesthetic beauty and wildlife habitat potential of these lands." Par. 6. The Government concedes in its own evidence that there is a discrete area north of the Colorado River in Arizona known as the Arizona Strip, JA 120, and that some of the lands<sup>57</sup> in the Strip have been opened to mining since 1981.<sup>58</sup> That

<sup>57</sup> According to the *Federal Register*, the following acreages in the Arizona Strip were opened to disposal or mineral development in 1981: Public Land Order (PLO) 5805, 46 Fed. Reg. 2,048 (1981), opened 23,041.12 acres to all forms of mining and disposal; PLO 5976, 46 Fed. Reg. 35,504 (1981), as amended by 47 Fed. Reg. 27,288 (1982), opened 225,480 acres to nonmetalliferous mining and disposal; and Classification A 1351, 46 Fed. Reg. 49,650 (1981), opened 1,307,667 acres to disposal, of which 8,219 acres were opened to all forms of mining. Thus, in 1981, protective withdrawals or classifications were terminated and lands made available for private acquisition for approximately 1.5 million acres, and over 250,000 acres were opened specifically to mining.

<sup>58</sup> JA 110, 122. The Government's affiant asserted that this opening "in our opinion" is likely to have little effect because the lands "do not contain any nonmetalliferous mineral that can be economically mined." A Government videotape, introduced along with the Lamb affidavit, JA 120, indicates that these lands contain rich

Erman's fears are well justified is attested to by the fact that 669 mining claims were staked in this area even between the time the terminations began and the injunction was issued. JA 77. And Judge Williams, in dissent below on the now-vacated preliminary injunction, stated that the Government had conceded in oral argument that "some of the acreage opened to mining was in the vicinity of lands used by one of [NWF's] members in Arizona." Pet. App. 90a; *see also id.* at 55a, 85a.

Even based solely on the Erman and Peterson affidavits, standing in this case is less problematic than it was in *SCRAP*. The plaintiffs there merely alleged that they used natural resources surrounding the Washington Metropolitan area and their widely-scattered legal residences, and that higher freight rates would increase pollution and thereby harm the plaintiffs' use of these areas. The Court held that the plaintiffs were in sufficiently close proximity to the alleged harm to deserve standing,<sup>59</sup> and that these allegations distinguished the plaintiffs from other citizens who did *not* use these natural resources. *SCRAP*, 412 U.S. at 685, 687, 689. Here, Peterson and Erman have sworn that opening to mining claims the very lands they use for recreational and aesthetic enjoyment threatens the aesthetic beauty and wildlife habitat potential of those lands. This injury is direct, obvious, concrete, and specific.

deposits of bentonite, a non-metalliferous material extracted by open pit operations. Moreover, the Government's evidence shows that a large number of mining claims have been staked on this property in recent years. JA  77

In any event, the affiant's opinion is just that—pure opinion, subject to proof at trial—and in no way affects the issue of standing to test that opinion.

<sup>59</sup> No Justice disagreed with this conclusion. Justice White, joined by Chief Justice Burger and Justice Rehnquist, dissented because, in their view, the causal link between higher rates and environmental harm was too attenuated. *SCRAP*, 412 U.S. at 722-724.

If the Government had acted lawfully, the terminations in all likelihood would never have taken place, because the RMPs, which necessarily contain EISs, would have demonstrated that the harm to environmental resources far outweighed any mining or other interests.<sup>60</sup> But RMPs and EISs, if prepared at all, were completed *after* terminations had been effected—too late for NWF and its members effectively to participate in the planning process and too late to allow them to demonstrate the full, adverse environmental impact.<sup>61</sup>

The Government contends that granting standing in this case will somehow result in a head-on confrontation between the judiciary and the other two branches of Government, and that a trial would require the District Court to review records relating to hundreds of individual land decisions. Ptrs. Br. 36-37. Nothing could be wider of the mark.

<sup>60</sup> NWF's contentions about the Government's failures to abide by its statutory duties are substantial. The District Court found in 1985 that "The Government never published its proposed decisions, as required by 43 C.F.R. § 2461.2," Pet. App. 141a; the notices it did publish in the Federal Register did not indicate whether EISs were prepared, whether land use plans supported the action, or whether the action had been sent to the President and Congress for review, *id.*; "FLPMA requires the President to transmit to the President of the Senate and the Speaker of the House the [Interior] Secretary's recommendations for withdrawal revocations," *id.* at 124a; FLPMA directs the Secretary to divulge land use plans, and yet, "as plaintiff alleges and defendants do not deny, defendants have completed only a fraction of the land use plans for these areas," *id.* at 131a; "[d]efendants' reliance on [MFPs] is misplaced and does not satisfy the statutory expectations of 'land use plans,'" *id.* at 132a; Congress "never authorized the vast scale of classifications without land use plans which we see today," *id.*; and "[d]espite the statutory command, defendants have failed to provide for public participation in their withdrawal revocation decisions." *Id.* at 133a.

<sup>61</sup> Thus, this case is wholly unlike cases such as *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980), where there was no statutory duty to create the documents in the first place.

If the Government has clearly violated the law in failing, *inter alia*, to undertake RMPs and EISs before completing terminations (just as the complaint here alleged), there can surely be no question but that the courts—in a proper case, with a proper plaintiff—can call the Government to account and order it to follow the statutory mandate. That hardly presents a head-on confrontation between branches of Government; instead, the judicial branch is simply carrying out its traditional duty to interpret and enforce the law. That being true, the only issue is one of standing—whether this case has a proper plaintiff.

But if NWF members *use* the lands where terminations are occurring, and the Government's actions have injured them in their recreation on those lands, there must be standing. Alternatively, if one of NWF's very purposes is to gather and disseminate information on terminations and their effect on recreation and wildlife, and this purpose has been defeated or threatened because the Government has violated its statutory duty to gather and provide such information, as well as to allow NWF and its members to participate in key decisionmaking, there can once again be no question but that these members, NWF on their behalf, and NWF on its own behalf, all have standing. There is thus no confrontation between branches, as the Government envisages.

In any event, regardless of how NWF's affidavits in this case are viewed, summary judgment was entirely inappropriate.<sup>62</sup> For example, the District Court accepted

<sup>62</sup> The Government cites *Celotex*, Ptrs. Br. 30 n.21, 41, but that case supports NWF. The Court there approved summary judgment on the merits against a plaintiff who was unable to support her complaint that decedent had been exposed to defendant's products. The Court rejected an argument that the moving party had to produce evidence of its own even though the plaintiff had failed in her proof. However, the Court emphasized that under Rule 56(c), summary judgment is proper only after consideration of the whole record, including pleadings, answers to interrogatories, admissions,

as true the Government's contention that Arizona Strip lands recently opened to mining possessed "no potential for non-metalliferous mining," and this conclusion was used to cast doubt on Erman's contention that he would be injured by the mining in the Strip. Pet. App. 36a. Yet the Government's own evidence shows that these lands had already been open to metalliferous mining, and that after they were opened to non-metalliferous mining in 1982 and prior to the injunction in 1985, 669 claims were filed there, JA 77—a material fact hardly consistent with a finding that the area had "no potential." This is just one example of how the District Court improperly accepted one version of disputed material facts that was wholly at odds with other evidence in the record. See *Liberty Lobby, Inc.*, 477 U.S. at 248-249.

In summary, as the Government implies, Ptrs. Br. 27-28, this Court's decisions on standing have not always been viewed as wholly consistent, one with the other. In cases such as this one, however, the thread that binds them is that at a constitutional minimum, putting aside redressability,<sup>63</sup> Article III requires that a party invoking a court's authority must show that he personally has suffered some actual or threatened injury as a result of the defendant's allegedly illegal conduct. *Allen*, 468 U.S. at 751; *Valley Forge Christian College*, 454 U.S. at 472; *Gladstone, Realtors*, 441 U.S. at 99; *Hunt*, 432 U.S. at 344-345; *Trafficante*, 409 U.S. at 208-212; *Flast*

and affidavits. 477 U.S. at 323-324. That rule is precisely applicable here. In fact, any ambiguity should have been construed in favor of the non-moving party, NWF. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

<sup>63</sup> There can be no question here that (a) there is a nexus between the harm suffered and the Government's termination program, and (b) the relief sought will redress the harm, both for the past and prospectively. See Pet. App. 120a-121a, 149a; see also n.43, *supra*. The facts here thus bear no relation to cases like *Allen v. Wright*, 468 U.S. 737 (1984), and *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976).

*v. Cohen*, 392 U.S. 83, 99 (1968).<sup>64</sup> Thus, all of the Court's cases are reconcilable at least in their underlying theme: a party merely claiming an *interest* in a problem (particularly an interest shared by the general public), or an injury with little nexus to the alleged wrong, does not have standing, because "that concrete adverseness which sharpens the presentation of issues" is absent.<sup>65</sup> On the other hand, if a party can show a particularized harm to himself—a personal stake in the outcome of the suit—and a direct relationship between his injury and the wrong, the issues are joined and there is standing.<sup>66</sup>

Here, NWF has as one of its purposes the monitoring and protection of the nation's natural resources so that its members can use and enjoy those resources. JA 12. The Government has instituted and is in the process of carrying out a huge, single-minded federal Program of opening up these federal lands to mining and other specialized interests. NWF has alleged, and the record shows, that this Program is being carried out illegally—directly contrary to the governing statutory mandate—that its members use these lands, and that the Government's program is harming these members in their recreational and other use of these lands.

<sup>64</sup> NWF has quite clearly met the "prudential limitations" on standing in the federal courts. See *Valley Forge Christian College*, 454 U.S. at 474-475; *Duke Power Co.*, 438 U.S. at 80; *Warth*, 422 U.S. at 499-500; *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-227 (1974). NWF's injuries fall squarely within the zone of interests protected by NEPA and FLPMA. The Government refers to this "zone of interests" test, but does not argue that it went unsatisfied here. Ptrs. Br. 27 n.20. See *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987).

<sup>65</sup> *Duke Power Co.*, 438 U.S. at 72; *Sierra Club v. Morton*, 405 U.S. at 735; *Baker v. Carr*, 369 U.S. at 204.

<sup>66</sup> *Franchise Tax Bd. of Calif. v. Alcan Aluminum Ltd.*, 110 S. Ct. 661, 664-665 (1990); *Clarke*, 479 U.S. at 402-403; *Havens Realty Corp.*, 455 U.S. at 372-379; *Gladstone, Realtors*, 441 U.S. at 110-115; *Duke Power Co.*, 438 U.S. at 78-81; *Camp*, 397 U.S. at 152.

We submit that even under the most narrow reading of the Court's decisions, NWF has passed the standing test. The entire record, as well as its own affidavits, support its allegations. And if the Court disagrees, the proper remedy is a remand to allow NWF to complete its record, as it surely can, or to allow further discovery.

### III. ALTERNATIVELY, THE CASE SHOULD BE REMANDED FOR A DETERMINATION AS TO WHETHER NWF ESTABLISHED STANDING ON ITS OWN ACCOUNT

If the Court were to disagree with both of NWF's first two arguments, this case should be remanded to the Court of Appeals. Because of its ruling that the Peterson affidavit was sufficient to establish NWF's standing, the appellate court never had to reach the issue of whether NWF established standing on its own account by demonstrating injury to the association itself. See *Havens Realty Corp.*, 455 U.S. at 369, 378-379; *Hunt*, 432 U.S. at 345; *Warth*, 422 U.S. at 511. The Court of Appeals should determine that issue in the first instance.

This is hardly a frivolous claim. "Informational injury"—injury resulting from a defendant's refusal or failure to provide information necessary to an association's proper functioning—has been held by the lower courts to constitute injury-in-fact to that association,<sup>67</sup> and this Court's decisions in such cases as *Havens Realty Corp.*, 455 U.S. at 379, and *Public Citizen*, 109 S. Ct. at 2563-64, are to the same effect.

In this case, informational injury has two aspects. First, as noted above, federal statutes specifically require

<sup>67</sup> E.g., *National Wildlife Fed'n*, 839 F.2d at 712; *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937-939 (D.C. Cir. 1986); *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 428 (1st Cir. 1983); *Cady v. Morton*, 527 F.2d 786, 790 (9th Cir. 1975); *Scientists' Inst. for Pub. Information, Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1087 n.29 (D.C. Cir. 1973); *National Org. for the Reform of Marijuana Laws (NORML) v. United States Dep't of State*, 452 F. Supp. 1226, 1230 (D.D.C. 1978).

the Government to publish FLPMA regulations, formulate RMPs and EISs, and include the public in agency decision-making. The complaint alleged that these procedures were not followed and that NWF has thereby been injured by its inability to provide information to its members about terminations and to participate in the decision-making process on those terminations. JA 12, par. 6; 19, par. 38; 20-21, pars. 40-41, 43-46. The Greenwalt affidavit gives specific examples of NWF's education program, its advocacy of improvements in controls over federal lands, and its monitoring of federal land laws, and alleges that NWF and its members, who contribute financially in part to obtain information on these issues, have been injured by the Government's failure to provide adequate information and opportunities for public participation. Pet. App. 193a-194a. Thus, not only has NWF been damaged by its inability to perform the very functions it was created to carry out, but it will be financially harmed if it cannot provide the information for which its members contribute money.<sup>68</sup>

<sup>68</sup> This is a far more direct and less problematical harm than that held sufficient in *Hunt*, where the North Carolina statute might have resulted in a contraction of the apple market in Washington State, which in turn might have caused a reduction in assessments paid to the plaintiff Commission. *Hunt*, 432 U.S. at 345. Nevertheless, the Commission's standing was upheld. *Id.* at 341-345.

The injury to NWF is also more specific and identifiable than that to the Village of Bellwood in *Gladstone, Realtors*, where the village's sole complaint was that it had been injured "by having the housing market in such village wrongfully and illegally manipulated to the economic and social detriment of the citizens of such village." Joint App., *Gladstone, Realtors* at 99, par. 12. The village's standing was upheld. *Gladstone, Realtors*, 441 U.S. at 109-111.

In *Public Citizen*, 109 S. Ct. at 2563, the Court found that the plaintiff organizations had standing even though all they sought was an opportunity to monitor the meetings of an ABA committee and participate effectively in the judicial selection process of that committee.

NWF's purposes here are thus quite akin to those that supported standing for the Washington Legal Foundation and Public Citizen in *Public Citizen*, 109 S. Ct. at 2563-64. NWF is "attempting to compel" the Government "to comply with" the law in part so that it can "monitor [the Government's] workings and participate more effectively in the \* \* \* process." *Id.* at 2563.

Second, it would be ironic indeed—and a miscarriage of justice—if the complaint and the Greenwalt affidavit were somehow deemed lacking in specificity. The Government, by the very act of violating the governing statutes and regulations and by refusing to produce information that Congress has commanded it to make public, would thereby have defeated a challenge to its legal authority. The complaint and affidavit would be deemed to contain too little information precisely *because* the Government refused to create it, which in turn is the very illegal act being challenged in the lawsuit.

The informational and educational role played by NWF is not one carried out by the public at large; it is a role unique to this organization and to a few others like it. The "public" does not gather, assimilate, critique and dispense information about the Government's termination program and the effects of those terminations on wildlife, recreation, hunting, and the like. NWF's role is therefore similar to that of HOME in *Havens Realty Corp.*, 455 U.S. at 379, where the defendants' steering practices adversely affected HOME's ability to provide counseling and referral services.

Thus, NWF's claim of standing on its own account is compelling. But because of rulings in favor of NWF on other questions, the Court of Appeals never had to reach or decide this important issue, either in its original ruling on the preliminary injunction, Pet. App. 48a-59a, or in its ruling on summary judgment, Pet. App. 10a-21a. This Court should not address that issue without first

obtaining the views of that court,<sup>69</sup> particularly because (a) review of this issue would necessitate an analysis not just of the Erman affidavit but of the entire record, (b) the Government has discussed the issue in only three pages of its brief, Ptrs. Br. 41-43, and (c) even this discussion appears to miss the point.<sup>70</sup>

### CONCLUSION

NWF respectfully submits, for the reasons set forth above, that:

(1) The writ should be dismissed as improvidently granted, or, in the alternative, the judgment below should be affirmed, because the Court of Appeals correctly ruled that, under D.C. Circuit law, the District Court abused its discretion in refusing to allow NWF to file five supplemental affidavits demonstrating without question its standing in this case; or

<sup>69</sup> See *International Brotherhood of Elec. Workers v. Heckler*, 481 U.S. 851, 865 (1987); *Escambia County v. McMillan*, 466 U.S. 48, 51-52 (1984); *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981).

<sup>70</sup> For example, the Government wholly misperceives NWF's position when it contends that NWF failed to allege that the Government withheld "any particular information" and that "extensive files" were made available to NWF. Ptrs. Br. 42-43. NWF's argument is not that it was denied access to a particular piece of information already in the Government's possession but rather that the Government had an affirmative legal duty, which it breached, to create RMPs and EISs *before* terminations began under the Government's Program.

NWF examined over 200 case files provided in response to discovery and FOIA requests, but it did not accept the Government's offer to review additional files which the Government opened to inspection, *see* Pet. App. 32a n.8; Ptrs. Br. 42, because NWF already knew that the documents being sought had never been created and therefore could not possibly be in the files. For example, the Government conceded that it had prepared no EIS on the Program, Ans. to Plaintiff's 1st Set of Interrogatories No. 2(a), 2d Set of Interrogatories Nos. 14, 15, and that it had produced no EISs in response to NWF's discovery request. ER 186.

(2) The judgment below should be affirmed because the record as a whole, including the Peterson and Erman affidavits as well as the Government's own evidence, supports the Court of Appeals' finding that NWF has standing in its representational capacity; or

(3) The case should be remanded to the Court of Appeals for its finding in the first instance, not heretofore made, as to whether NWF has standing in its own right as an organization.

Respectfully submitted,

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## **APPENDICES**

## APPENDIX A

[NEPA]

**42 U.S.C. § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts**

The Congress authorizes and directs that, to the fullest extent possible: \* \* \* (2) all agencies of the Federal Government shall—

\* \* \* \*

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible or irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards,

shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

\* \* \*

[FLPMA]

**43 U.S.C. § 1701. Congressional declaration of policy**  
[§ 102]

(a) The Congress declares that it is the policy of the United States that—

\* \* \*

(2) the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts;

(3) public lands not previously designated for any specific use and all existing classifications of public lands that were effected by executive action or statute before October 21, 1976, be reviewed in accordance with the provisions of this Act;

\* \* \*

(7) goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;

\* \* \*

**43 U.S.C. § 1702. Definitions** [§ 103]

\* \* \*

(c) The term "multiple use" means the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all

of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

(d) The term "public involvement" means the opportunity for participation by affected citizens in rulemaking, decisionmaking, and planning with respect to the public lands, including public meetings or hearings held at locations near the affected lands, or advisory mechanisms, or such other procedures as may be necessary to provide public comment in a particular instance.

\* \* \*

(j) The term "withdrawal" means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; or transferring jurisdiction over an area of Federal land, other than "property" governed by the Federal Property and Administrative Services Act, as amended (40 U.S.C. 472) from one department, bureau or agency to another department, bureau or agency.

\* \* \*

**43 U.S.C. § 1712. Land use plans [§ 202]**

- (a) Development, maintenance, and revision by Secretary

The Secretary shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands. Land use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses.

\* \* \*

- (d) Review and inclusion of classified public lands; review of existing land use plans; modification and termination of classifications

Any classification of public lands or any land use plan in effect on October 21, 1976, is subject to review in the land use planning process conducted under this section, and all public lands, regardless of classification, are subject to inclusion in any land use plan developed pursuant to this section. The Secretary may modify or terminate any such classification consistent with such land use plans.

\* \* \*

- (f) Procedures applicable to formulation of plans and programs for public land management

The Secretary shall allow an opportunity for public involvement and by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands.

**43 U.S.C. § 1714. Withdrawals of lands [§ 204(a)]**

- (a) Authorization and limitation; delegation of authority

On and after the effective date of this Act the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section. The Secretary may delegate this withdrawal authority only to individuals in the Office of the Secretary who have been appointed by the President, by and with the advice and consent of the Senate.

\* \* \*

- (l) Review of existing withdrawals in certain States; procedure applicable for determination of future status of lands; authorization of appropriations

(1) The Secretary shall, within fifteen years of October 21, 1976, review withdrawals existing on October 21, 1976, in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming of (1) all Federal lands other than withdrawals of the public lands administered by the Bureau of Land Management and of lands which, on October 21, 1976, were part of Indian reservations and other Indian holdings, the National Forest System, the National Park System, the National Wildlife Refuge System, other lands administered by the Fish and Wildlife Service or the Secretary through the Fish and Wildlife Service, the National Wild and Scenic Rivers System, and the National System of Trails; and (2) all public lands administered by the Bureau of Land Management and of lands in the National Forest System (except those in wilderness areas, and those areas formally identified as primitive or natural areas or designated as national recreation areas) which closed the lands to appropriation under the Mining Law of 1872 (17 Stat. 91, as amended; 30 U.S.C. 22 et seq.) or to leasing under the Mineral Leasing Act of 1920 (41 Stat. 437, as amended; 30 U.S.C. 181 et seq.).

(2) In the review required by paragraph (1) of this subsection, the Secretary shall determine whether, and for how long, the continuation of the existing withdrawal of the lands would be, in his judgment, consistent with the statutory objectives of the programs for which the lands were dedicated and of the other relevant programs. The Secretary shall report his recommendations to the President, together with statements of concurrence or nonconcurrence submitted by the heads of the departments or agencies which administer the lands. The President shall transmit this report to the President of the Senate and the Speaker of the House of Representatives, together with his recommendations for action by the Secretary, or for legislation. The Secretary may act to terminate withdrawals other than those made by Act of the Congress in accordance with the recommendations of the President unless before the end of ninety days (not counting days on which the Senate and the House of Representatives has adjourned for more than three consecutive days) beginning on the day the report of the President has been submitted to the Senate and the House of Representatives the Congress has adopted a concurrent resolution indicating otherwise. If the committee to which a resolution has been referred during the said ninety day period, has not reported it at the end of thirty calendar days after its referral, it shall be in order to either discharge the committee from further consideration of such resolution or to discharge the committee from consideration of any other resolution with respect to the Presidential recommendation. A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported such a resolution), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the

motion was agreed to or disagreed to. If the motion to discharge is agreed to or disagreed to, the motion may not be made with respect to any other resolution with respect to the same Presidential recommendation. When the committee has reprinted, or has been discharged from further consideration of a resolution, it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

\* \* \* \*

#### 43 U.S.C. § 1732. Management of use, occupancy, and development of public lands [§ 302]

(a) Multiple use and sustained yield requirements applicable; exception

The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available, except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.

\* \* \* \*

#### 43 U.S.C. § 1739. Advisory councils [§ 309]

\* \* \* \*

(e) Public participation; procedures applicable

In exercising his authorities under this Act, the Secretary, by regulation, shall establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards and criteria for, and to participate in, the preparation and execution of plans and programs for, and the management of, the public lands.

**13 U.S.C. § 1719. Rules and regulations [§ 310]**

The Secretary, with respect to the public lands, shall promulgate rules and regulations to carry out the purposes of this Act and of other laws applicable to the public lands, and the Secretary of Agriculture, with respect to lands within the National Forest System, shall promulgate rules and regulations to carry out the purposes of this Act. The promulgation of such rules and regulations shall be governed by the provisions of chapter 5 of Title 5, without regard to section 553(a)(2). Prior to the promulgation of such rules and regulations, such lands shall be administered under existing rules and regulations concerning such lands to the extent practical.

[Public Law and Regulations]

**Pub. L. No. 94-579, § 701.**

\* \* \*

(c) All withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law.

\* \* \*

**43 C.F.R. § 1601.0-5. Definitions**

\* \* \*

(k) "Resource management plan" means a land use plan as described by the Federal Land Policy and Management Act. The resource management plan generally establishes in a written document:

(1) Land areas for limited, restricted or exclusive use; designation, including ACEC designation; and transfer from Bureau of Land Management Administration;

(2) Allowable resource uses (either singly or in combination) and related levels of production or use to be maintained;

(3) Resource condition goals and objectives to be attained;

(4) Program constraints and general management practices needed to achieve the above items;

(5) Need for an area to be covered by more detailed and specific plans;

(6) Support action, including such measures as resource protection, access development, realty action, cadastral survey, etc., as necessary to achieve the above;

(7) General implementation sequences, where carrying out a planned action is dependent upon prior accomplishment of another planned action; and

(8) Intervals and standards for monitoring and evaluating the plan to determine the effectiveness of the plan and the need for amendment or revision.

It is not a final implementation decision on actions which require further specific plans, process steps, or decisions under specific provisions of law and regulations.

**43 C.F.R. § 1601.0-6. Environmental impact statement policy**

Approval of a resource management plan is considered a major Federal action significantly affecting the quality of the human environment. The environmental analysis of alternatives and the proposed plan shall be accomplished as part of the resource management planning process and, wherever possible, the proposed plan and related environmental impact statement shall be published in a single document.

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## APPENDIX B

[Dept. Logo]

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SOLICITOR  
WASHINGTON, D.C. 20240

July 22, 1988

BLM.ER.0569

Kathleen C. Zimmerman, Esquire  
National Wildlife Federation  
1412 16th Street, N.W.  
Washington, D.C. 20036

Dear Ms. Zimmerman:

As directed by the court, I am providing you with a copy  
of the exhibit submitted to the court by the Government  
on July 22, 1988.

Sincerely  
/s/ Paul B. Smyth  
PAUL B. SMYTH

Enclosure

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## RESOURCE MANAGEMENT PLANNING

Table I

Resource Management Planning Summary  
July 20, 1988

State Office	Number of Plans Completed Through			Number of Plans Approved
	NOI	Draft	Proposed/ Final	
Alaska	2	1	0	3
Arizona	2	1	0	2
California	1	1	0	4
Colorado	1	1	1	6
Idaho	0	0	0	7
Montana	0	1	0	6
Nevada	0	0	0	7
New Mexico	0	1	3	2
Oregon	6	1	1	3
Utah	2	1	1	6
Wyoming	0	2	2	4
TOTALS	14	10	08	50

Table II

Surface Acres covered by RMPs  
July 20, 1988

	# of RMPs	Total Surface Acres covered by RMPs	Total Surface Acres Administered	% Public Lands covered by RMP
Bureauwide	50	81,908,000	333,283,000	25.6
Exclu. Alaska	47	70,201,000	175,990,000	39.9

Table III

Statutes of Resource Management Plans in Progress  
July 20, 1988

State/Plan	NOI	Draft	Proposed	Status
AK Fort Wainwright	07/21/87			Draft exp. 9/88
Fort Greeley	07/21/87			Draft exp. 9/88
South Central				NOI exp. 11/88
Utility Corridor	01/16/86	08/28/87		Final exp. FY89
AZ Arizona Strip	07/22/87			Draft exp. FY89
Kingman				NOI exp. FY88
Phoenix	01/17/86	02/29/88		Final exp. FY89
Safford	09/22/87			Draft exp. 5/89
CA Arcata	01/29/86	03/18/88		Final exp. FY89
Bishop	06/27/88			Draft exp. FY88
South Metro				NOI exp. FY89
Redding				NOI exp. FY89
CO Gunnison Basin				NOI exp. FY88
Little Snake	10/22/84 <sup>1</sup>	02/07/86	10/03/86	Pending Revised Protest
San Luis	01/16/86			Draft exp. 1/89
Uncompahgre	07/28/83	07/31/87		Final exp. 9/88
MT Judith/Phillips/Valley				NOI exp. 7/88
West Hi-Line	09/18/86 <sup>2</sup>	06/05/87		Final exp. 7/88
NV Nellis				NOI exp. 7/88
NM Carlsbad	10/25/83	03/21/86	10/10/86 <sup>3</sup>	Under protest
Farmington	05/16/85	03/06/87	09/25/87	Under protest
Socorro	01/28/86	01/22/88		Final exp. 9/88
Taos	01/26/84	03/27/87	10/09/87	ROD Pending
OR Baker	03/05/85	04/18/86	10/03/86	ROD Pending
Brothers/LaPine	09/03/86	10/23/87		Final exp. 10/88
Coos Bay	09/03/86			Draft exp. 10/89
Three Rivers (D/R)	09/28/87			Draft exp. FY89
Eugene	09/03/86			Draft exp. 10/89
Medford	09/03/86			Draft exp. 10/89
Roseberg	09/03/86			Draft exp. 10/89
Salem	09/03/86			Draft exp. 10/89

<sup>1</sup> Original Little Snake NOI published 6/23/83.

<sup>2</sup> Original West Hi-Line NOI published 12/6/83.

<sup>3</sup> Supplement to proposed Carlsbad RMP issued 12/16/86.

State/Plan	NOI	Draft	Proposed	Status
UT Diamond Mountain				NOI exp. FY88
Dixie	11/14/86			Draft exp. FY89
Pony Express	11/21/86	05/13/88		Final exp. 9/88
San Juan	03/11/83	06/20/86	12/28/87	Under protest
San Rafael	06/03/85			Draft exp. 8/88
WY Cody	02/09/86	04/01/88		Final exp. 9/88
Green River				NOI exp. FY88
Medicine Bow	02/28/86	06/19/87		Final exp. 9/88
Pinedale	09/30/83	03/06/87	12/04/87	ROD pending
Washakie	02/03/83	11/21/86	11/13/87	Under protest

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Table IV

Approved Resource Management Plans  
July 20, 1988

State/Plan Name	Date NOI Published	Date ROD Approved	Surface Acres Covered by RMP
<b>Alaska</b>			
Central Yukon	11/51/82	09/26/86	9,487,000
Steese	11/16/81	02/02/86	1,220,000
White Mountain	11/16/81	02/02/86	1,000,000
<b>Total</b>			<b>11,707,000</b>
<b>Arizona</b>			
Lower Gila South	6/14/83	05/11/87 <sup>1</sup>	2,009,000
Yuma	05/04/83	05/01/86 <sup>2</sup>	1,192,000
<b>Total</b>			<b>3,201,000</b>
<b>California</b>			
Alturas	09/30/80 <sup>3</sup>	08/28/84	407,000
CDCA	N.A.	12/19/80	12,131,000
Coast/Valley	09/30/82	09/06/85	237,000
Hollister	02/26/82	08/06/84	238,000
<b>Total</b>			<b>13,103,000</b>
<b>Colorado</b>			
Glenwood Springs	10/19/79	01/03/84	566,000
Grand Junction	12/08/82	01/29/87	1,280,000
Kremmling	01/18/80	12/19/84	398,000
Northeast	11/14/80	09/16/86	32,000
Piceance Basin	07/22/82	03/13/87	604,000
San Juan/San Miguel	01/05/81	09/05/85 <sup>4</sup>	994,000
<b>Total</b>			<b>3,874,000</b>
<b>Idaho</b>			
Cascade	11/25/83	07/01/88	488,000
Cassia	02/06/81	01/24/85	476,000
Jarbridge	02/10/81	03/23/87	1,690,000
Lemhi	07/07/83	04/08/87	460,000
Medicine Lodge	03/26/81	11/29/85	649,000
Monument	03/19/81	04/22/85	1,179,000
Pocatello	01/17/85	01/08/88	265,000
<b>Total</b>			<b>5,207,000</b>

<sup>1</sup> Partial Lower Gila South RMP approved 5/11/87; complete ROD pending.

<sup>2</sup> Partial Yuma RMP approved 5/1/86; complete RMP approved 5/23/88.

<sup>3</sup> Alturas RMP NOI Amended 3/31/88.

<sup>4</sup> Partial San Juan/San Miguel RMP approved 8/85; complete RMP approved 9/85.

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Table IV (Continued)

State/Plan Name	Date NOI Published	Date ROD Approved	Surface Acres Covered by RMP
<b>Montana</b>			
Billings	08/18/80	09/28/84	432,000
Garnet	02/20/81	01/10/86	146,000
Headwaters	03/05/80	07/ /84	311,000
North Dakota	12/29/84	04/19/88	67,500
Powder River	06/19/80	03/15/85	1,081,000
South Dakota	06/04/82	04/14/86	281,000
<b>Total</b>			<b>2,318,000 [sic]</b>
<b>Nevada</b>			
Egan	07/16/82	02/03/87	3,800,000
Elko	11/09/83	03/11/87	3,134,000
Esmeralda/So. Nye	03/11/83	10/10/86	3,400,000
Lahontan	07/09/81	09/03/85	2,400,000
Shoshone/Eureka	03/02/81	02/26/86	4,300,000
Walker	03/31/83	06/09/86	1,900,000
Wells	05/23/80	07/16/85	4,300,000
<b>Total</b>			<b>23,234,000</b>
<b>New Mexico</b>			
Rio Puerco	03/23/83	01/16/86	896,000
White Sands	08/23/83	09/05/86	1,800,000
<b>Total</b>			<b>2,696,000</b>
<b>Oregon</b>			
John Day	01/28/81	08/28/85	182,000
Spokane	07/21/83	05/19/87	308,000
Two Rivers	09/21/84	06/06/86	325,000
<b>Total</b>			<b>815,000</b>
<b>Utah</b>			
Book Cliffs	03/07/80	06/03/85	1,080,000
Box Elder	09/21/84 <sup>5</sup>	04/18/86	1,012,000
Cedar/Beaver/ Garfield/Antimony	04/10/80	10/01/86	1,071,000
Grand	02/12/80 <sup>6</sup>	06/24/85	1,853,000
House Range	05/01/85 <sup>7</sup>	10/28/87	2,245,000
Warm Springs	05/01/85 <sup>8</sup>	03/30/87	2,227,000
<b>Total</b>			<b>9,488,000</b>

<sup>5</sup> Box Elder RMP NOI Amended 1/25/88.

<sup>6</sup> Grand RMP NOI Amended 2/11/88.

<sup>7</sup> House Range NOI initially published 1/12/83; amended 6/6/83.

<sup>8</sup> Warm Springs NOI initially published 2/8/80.

Table IV (Continued)

State/Plan Name	Date NOI Published	Date ROD Approved	Surface Acres Covered y RMP
Wyoming			
Buffalo	04/04/82	10/04/85	799,000
Kemmerer	10/07/81	04/29/86	1,633,000
Lander	01/26/84	06/19/87	2,500,000
Platte River	12/02/81	08/05/85	1,400,000
Total			<u>6,332,000</u>

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No. 89-640

Supreme Court, U.S.  
FILED  
APR 6 1990  
JOSEPH F. SPANIOLO, JR.  
CLERK

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**In the Supreme Court of the United States**  
OCTOBER TERM, 1989

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**MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,  
ET AL., PETITIONERS**

*v.*

**NATIONAL WILDLIFE FEDERATION, ET AL.**

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**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT**

---

**REPLY BRIEF FOR THE PETITIONERS**

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**JOHN G. ROBERTS, JR.**  
*Acting Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 633-2217*

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**In the Supreme Court of the United States**

OCTOBER TERM, 1989

---

No. 89-640

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,  
ET AL., PETITIONERS

*v.*

NATIONAL WILDLIFE FEDERATION, ET AL.

---

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

---

REPLY BRIEF FOR THE PETITIONERS

---

This is a case about standing jurisprudence—and, more specifically, about whether a federal court may effectively supply the requisite proof of standing by “presuming” facts that the parties did not—and perhaps cannot—allege on their own. The court of appeals held that respondent had sufficiently demonstrated its standing in this case when it submitted the single affidavit of one of its members, Peggy Kay Peterson. Peterson averred that her recreational use of federal lands “in the vicinity of the South Pass-Green Mountain area of Wyoming” had been af-

affected by unlawful actions taken by petitioners. Although the court of appeals acknowledged that only 4,500 acres of that 2,000,000 acre federally-managed area had been affected by petitioners' land use decisions, and that Peterson had not alleged any use of those particular 4,500 acres, the court held that the affidavit could be read "to *presume* that the 4500 newly opened acres included the areas that Peterson uses" (Pet. App. 16a-17a). Without such a "presumption," the court added, Peterson's use and enjoyment "would not be 'adversely affected.' \* \* \* If Peterson was not referring to lands in this 4500-acre affected area, her allegation of impairment to her use and enjoyment would be meaningless, or perjurious." *Ibid.* Refusing to entertain either possibility, the court of appeals determined that Peterson's language must be "read to refer to the lands affected by the Program." *Ibid.* And, by "presuming" the necessary facts, the court conferred standing on respondent to challenge not only the order pertaining to the 4,500 affected acres in the South Pass-Green Mountain area, but also those relating to the entire 180,000,000 acres of federal land at stake in the litigation.

We restate the court of appeals' decision because respondent evidently has no desire to defend it on its own terms. Disavowing the court's actual holding, respondent offers a variety of alternative rationales, each equipped with its own form of relief. First, respondent asks the Court to dismiss the writ of certiorari, contending that the court of appeals' ruling that the district court abused its discretion in refusing to consider the supplemental affidavits—proffered after the close of the summary judgment hearing in violation of Fed. R. Civ. P. 56(c)—was merely an application "of local practice" (Resp. Br. 17), and is therefore unworthy of this Court's review. Second

and alternatively, respondent asks that the court of appeals' decision be affirmed, in that Peterson's and Erman's affidavits, when "read together with the Government's own evidence" (*id.* at 15), sufficiently established the organization's standing. Finally, and again alternatively, respondent asks the Court to remand the case for a decision on the sufficiency of its "informational standing" allegations, notwithstanding the trial court's determination that the Greenwalt declaration, in which those allegations were made, was "conclusory and completely devoid of specific facts" (Pet. App. 32a).<sup>1</sup>

1. Respondent makes no effort to defend the reasoning of the court of appeals. Instead, it devotes the major portion of its brief to the question whether certiorari should be granted in this case—a question that the parties fully debated at the petition stage. Elaborating on the argument previously made in its brief in opposition (at 20-22), respondent asserts that the sufficiency of the Peterson affidavit need not be considered by this Court, in light of the supplemental affidavits submitted to the trial court but rejected by that court as untimely. In respondent's view, the court of appeals' decision, setting aside the trial court's conceded exercise of discretion (Resp.

<sup>1</sup> Although correctly observing that "standing 'in no way depends on the merits of the [claim]'" (Resp. Br. 22 n.35 (brackets in original)), respondent nonetheless repeatedly characterizes petitioners' termination and revocation decisions as politically motivated (*e.g.*, *id.* at 4), damaging to the environment (*e.g.*, *id.* at 34-35), and otherwise unlawful (*e.g.*, *id.* at 41). Without attempting to address the merits, we note that in the one discrete case evaluated by the district court—indeed, the very case challenged in the Peterson affidavit—petitioners' termination decision was found to be entirely consistent with the law. See Pet. App. 35a n.12 (termination of Classification W-6228).

Br. 19), was simply a matter "of local practice" (*id.* at 17), consistent with "the spirit of this Court's rulings" (*id.* at 17-18), and with "fundamental" fairness (*id.* at 19). In light of this alternative (but assertedly unimportant) ground for the judgment below, respondent urges this Court to dismiss the writ of certiorari. That contention is flawed at every turn.

a. As an initial matter, respondent's effort to renew the battle to deny certiorari is inappropriate. Our petition presented two questions for review: the sufficiency of the Peterson affidavit; and the propriety of summary judgment, in light of respondent's failure to make a timely showing of standing. Pet. I. Had this Court concluded that the second question was unworthy of review—as respondent again urges—it could have limited the grant of certiorari to the first question only. The Court elected to review both questions, and in our view it did so correctly. Even if, as respondent suggests, the second question might not have independently warranted this Court's review, the two questions taken together present the case in its full context and raise important issues of federal court superintendence of the day-to-day operation of Executive Branch activities.<sup>2</sup>

b. In any event, respondent's reliance on the supplemental affidavits is unavailing. It is important to recount the circumstances under which the trial court declined to accept the supplemental affidavits. Throughout this extended litigation, respondent en-

<sup>2</sup> Respondent's amici Wilderness Society et al. err in contending that the appropriateness of the trial court's decision rejecting the supplemental affidavits "is not fairly encompassed within the question upon which the Court granted review." Amici Br. 6-7 n.1. As noted, the Court granted two questions, and the supplemental affidavit issue is at the heart of the second question presented.

joyed repeated opportunities to offer additional evidence on the question of standing, but steadfastly refused to supplement the record. Indeed, respondent early on resisted the government's effort to secure discovery on the standing issue, contending that further inquiry "would be unreasonably cumulative, duplicative, burdensome and expensive" (Motion to Quash and for a Protective Order at 7; Pet. App. 170a).<sup>3</sup> Even after the government filed its summary judgment motion specifically addressed to standing, respondent chose to submit no further evidence to the court.<sup>4</sup> And respondent itself moved for summary judgment—which required it to assure the district court that there were no material issues of fact outstanding, including issues of fact going to standing (see June 23, 1986 Motion for Summary Judgment). Respondent thus quite deliberately chose to join issue on the basis of its initial affidavits.

Only after the conclusion of the hearing on summary judgment, when the district court asked for additional legal *memoranda*, did respondent come

<sup>3</sup> Respondent notes that the government contested the sufficiency of the supplemental affidavits before the court of appeals, but finds it "significant" that we have not done so in this Court. Resp. Br. 16 n.23. There is no reason for us to do so: the trial court declined to accept those affidavits, and our submission in this Court is that the trial court exercised its discretion correctly. Further, in light of the trial court's decision, we had no occasion to inquire into or contest the sufficiency and bona fides of the supplemental affidavits. This Court, moreover, is hardly the place to conduct fresh discovery.

<sup>4</sup> Indeed, in its opposition papers, respondent insisted that "[t]he three standing affidavits" it had previously submitted were "far more than is necessary to prove standing." Plaintiff National Wildlife Federation's Memorandum In Response To Defendants' Motions To Dismiss And Cross Motions For Summary Judgment at 5.

forward with new *affidavits*, while offering no excuse for the tardy submission.<sup>5</sup> The trial court acted well within its discretion in declining the proffer.<sup>6</sup> And the decisions of this Court and others—whose “spirit” respondent invokes (Resp. Br. 17-18 & nn.27, 28)—do not hold or suggest the contrary.<sup>7</sup>

<sup>5</sup> Respondent contends that “in light of the fluid state of the record,” it “was not unreasonable \* \* \* to interpret” the request for supplemental “memoranda” as an invitation to submit “additional affidavits.” Resp. Br. 19. This will not do; lawyers know the difference between legal memoranda and factual affidavits.

<sup>6</sup> See *Clinkscales v. Chevron U.S.A., Inc.*, 831 F.2d 1565, 1568 (11th Cir. 1987); *Farina v. Mission Investment Trust*, 615 F.2d 1068, 1076 (5th Cir. 1980); *Beaufort Concrete Co. v. Atlantic States Constr. Co.*, 352 F.2d 460, 462-463 (5th Cir. 1965), cert. denied, 384 U.S. 1004 (1966).

<sup>7</sup> For example, in *Warth v. Seldin*, 422 U.S. 490, 518 (1975), the Court affirmed the dismissal of the complaint by the district court for lack of standing, without giving the plaintiffs an additional opportunity to develop factual support. *Sierra Club v. Morton*, 405 U.S. 727 (1972), did not involve a remand either; the only issue before the Court was whether to sustain the grant of a preliminary injunction. In *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), the Court held that two of the individual plaintiffs lacked standing to sue, but, noting that it “encounter[ed] the[] allegations at the pleading stage” (*id.* at 112), remanded the case so that the trial court could, if it chose, “permit [the plaintiffs] \* \* \* to amend their complaints” (*id.* at 112-113 n.25). Similarly, in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377-378 (1982), the Court remanded for further factual development on standing. In the *Havens* case, however, the Court noted that the lower court’s dismissal had been on the pleadings alone, and it directed a remand for the purpose of affording plaintiffs an opportunity to make more definite the allegations of the complaint. Here, by contrast, it was not the pleadings alone, but also the evidence submitted in support of the pleadings, that was deficient. Moreover, respondent had repeated

No rule “of local practice” (Resp. Br. 17) required the trial court to accept the supplemental affidavits. In the first place, there is no such “local rule” in the District of Columbia Circuit. Certainly the single case relied on by the court of appeals for its decision (Pet. App. 21a), and the cases cited by respondent (Resp. Br. 17-18 n.26), announce no principle that requires district courts to accept tardy filings in summary judgment proceedings.<sup>8</sup> And even were it a

opportunities over several years to remedy the defects. It chose not to do so. For the same reason, respondent’s reliance (Resp. Br. 18 n.28) on two court of appeals decisions—for the unexceptionable proposition that summary judgment may not be entered without affording the opposing party an opportunity to present evidence—is misplaced.

<sup>8</sup> In none of the cited cases did the District of Columbia Circuit require a district judge to accept affidavits that he had found to be untimely. For example, in *National Wildlife Federation v. Hodel*, 839 F.2d 694 (1988), the court noted that, in a prior appeal, it had ordered the district court to receive affidavits relating to standing; but in that case the district court had “initially made no fact findings on the subject” (*id.* at 703), and there was no indication that the district court had declined in the prior proceedings to accept affidavits from the parties. Similarly, in *Wilderness Society v. Griles*, 824 F.2d 4 (1987), although the court of appeals ordered the district court to permit further discovery on the standing issue, the district court had previously refused to permit any discovery relating to standing. In *DKT Memorial Fund, Ltd. v. Agency for International Development*, 810 F.2d 1236 (1987), the court permitted the plaintiff to amend its complaint to add an allegation it had “inadvertent[ly]” omitted (*id.* at 1239); but there was no suggestion that the district court had prohibited the plaintiff, due to tardiness or otherwise, from doing so. And in *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165 (1986), the court of appeals directed the plaintiff to file a supplemental statement regarding standing; there is no indication that the district court had declined to accept such a statement.

"local practice" to absolve litigants of their own delay, such a "practice" would contravene "the plain language of Rule 56(c)" of the Federal Rules of Civil Procedure (*Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)), which provides that an "adverse party" may serve "opposing affidavits" in summary judgment proceedings, but only "prior to the day of the hearing." Respondent's supplemental affidavits were submitted *after* the day of the hearing. The "local practice" invoked by respondent—under which advocates could supplement the record whenever they thought they were in danger of losing—could not survive a conflict with Rule 56(c). See *United States v. Hastings*, 461 U.S. 499, 505-509 (1983); *United States v. Payner*, 447 U.S. 727, 733-737 (1980).<sup>9</sup>

c. Respondent contends that we ourselves filed an untimely document and that it would "be wholly unfair—and in fact a violation of fundamental rights—for the Government to spring this evidence on [respondent] at the hearing and then prevent it from filing counter-evidence" (Resp. Br. 19). The record belies that assertion.

<sup>9</sup> Respondent never precisely articulates the "local practice" that entitled it to submit new factual materials after the close of the summary judgment hearing. It appears, however, that the "practice" applies whenever a party believes—however wrongly—that it has "already submitted sufficient evidence," and discovers—however late in the day—that the trial court may have "serious[] question[s]" concerning the strength of its argument. Resp. Br. 21-22. Such a "practice," of course, is a recipe for interminable litigation: as soon as one party appears likely to lose, he is entitled to reopen the proceedings and shore up his position. The "local practice" asserted by respondent thus "calls to mind what was said of the Roman Legions: that they may have lost battles, but they never lost a war, since they never let a war end until they had won it." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 702 (1981) (Rehnquist, J., dissenting).

During the oral argument on the summary judgment motion, respondent's trial counsel contended that the government had "presently completed only twenty-five of a hundred-fifty required [Resource Management] Plans." July 22, 1988 Tr. 12. As a result, counsel argued, the government's actions "could not possibly have been executed in reliance upon the land use plans required by FLPMA." *Id.* at 13. In response, government counsel advised the court that the figure cited by respondent's counsel was out of date. "The current figures," counsel reported, "indicate \* \* \* that there are now 50 approved [plans]," an additional 14 plans "where notice of intent to proceed [has] \* \* \* been given," and "ten additional in draft and eight more in proposed findings." *Id.* at 53. The court then asked counsel to specify the total acreage covered by the approved RMPs. *Id.* at 55. In response, counsel offered to submit a four-page document "that gives the particulars." *Ibid.* The court instructed counsel to mark the exhibit, supply a copy of it to respondent's counsel, and leave a copy with the clerk. *Id.* at 55-56. Without objection from respondent, government counsel did so. *Id.* at 56.

Plainly, the government did not "spring this evidence on [respondent] at the hearing" (Resp. Br. 19).<sup>10</sup> Addressing an issue first raised during the hearing *by respondent*, the government simply corrected respondent's reliance on stale data. More pertinently for present purposes, the RMP exhibit had nothing whatever to do with respondent's standing to

<sup>10</sup> Indeed, respondent's failure to object to the submission doubtless reflected its "recognition that the action of the trial judge" in accepting the exhibit "was unexceptionable." *Johnson v. United States*, 318 U.S. 189, 203 (1943) (Frankfurter, J., concurring).

sue; as respondent itself has acknowledged at an earlier point in this case, the exhibit dealt solely with "the substantive merits of [petitioners'] case" (Br. in Opp. 21 n.14). Respondent's supplemental standing affidavits were in no sense "counter-evidence" (Resp. Br. 19) whose filing was somehow required by the RMP exhibit. Certainly the supplemental filings themselves made no reference whatever to the RMP exhibit (see Br. in Opp. App. 1a-17a), or to any other filing by the government. Nor did respondent seek leave from the trial court to "counteract" the RMP exhibit. Respondent proffered the supplemental affidavits not to refute the government's evidence, but to ward off defeat. It did so too late.

d. In short, the court of appeals erred, and erred badly, in reversing the trial court's refusal to accept supplemental affidavits that were untimely under Rule 56(c) and submitted in violation of court order. Under the circumstances, the trial court had every right to reject them. The court of appeals' contrary view does not furnish a basis for dismissing the writ of certiorari.<sup>11</sup>

<sup>11</sup> Respondent observes that this Court has traditionally been "reluctan[t] to review decisions of the courts of the District [of Columbia] involving matters of peculiarly local concern." Resp. Br. 17 n.25 (quoting *Pernell v. Southall Realty*, 416 U.S. 363, 366 (1974)). The quotation is from a case reviewing a decision not of the Court of Appeals for the District of Columbia Circuit, but rather the District of Columbia Court of Appeals, in many respects the counterpart of a state supreme court. The propriety of deference to such a court on questions of "peculiarly local concern" has of course nothing whatever to do with review of a federal circuit court's rulings on matters of "general federal law," *ibid.*, including interpretations of the Federal Rules of Civil Procedure.

2. a. When, at long last, respondent turns its attention to the sufficiency of the Peterson affidavit (Resp. Br. 26-35), it embraces the central failing of the court below—"infern[ing]" standing "argumentatively from averments in the pleadings." *FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 608 (1990). Indeed, although respondent expressly disavows the court of appeals' "presumption" (Resp. Br. 32), its effort at bolstering Peterson's affidavit simply recapitulates that presumption in another guise.

Attempting to tie Peterson to the affected 4500 acres, respondent reasons as follows: Peterson "referred to the South Pass-Green Mountain area 'opened' to mining" (Resp. Br. 29); only 4455 acres were actually opened to mining (*ibid.*); therefore Peterson's affidavit must be construed to allege use of land "in the vicinity" of those specific 4455 acres.<sup>12</sup> But Peterson made no such allegation. What she said

<sup>12</sup> Respondent offers what appears to be yet another proposed construction of the Peterson affidavit. It notes that there is "a specific pass" named "South Pass" and "a specific mountain" called "Green Mountain." From that, respondent infers that Peterson's affidavit must be understood as alleging a use of lands "in the vicinity of" these particularized places." Resp. Br. 29. But as the trial court found (Pet. App. 35a), "Green Mountain" and "South Pass" are not "particularized places"; they are vast regions in Central Wyoming that comprise millions of acres of federal land. Not surprisingly, Peterson referred to "South Pass-Green Mountain, Wyoming" and "the South Pass-Green Mountain area of Wyoming"—obviously referring to a region, and not to a specific pass and mountain. That, in turn, made perfect sense, since the 4500 affected acres do not all fall within or even near the particular mountain and pass (which are themselves quite far from each other), but within the much larger region that takes its name from those landmarks.

was that she uses federal lands "in the vicinity of the South Pass-Green Mountain area of Wyoming" (Pet. App. 190a)—a region that the trial court found to include some 2,000,000 acres (Pet. App. 35a). Peterson did *not* claim to use land near the affected parcels; she did not even *specify* the affected parcels, even though those parcels had been individually identified in the Federal Register nearly two years before she filed her affidavit. See 49 Fed. Reg. 19,904-19,905 (1984). Respondent *knew* which 4500 acres were affected; if Peterson or any other of its members *could* have alleged use of those parcels or specific areas near those parcels, presumably they *would* have. Indeed, it was precisely because Peterson did *not* expressly demonstrate a connection to the affected acres that the court of appeals felt it necessary to "presume" a connection on her behalf. But as the same Circuit has noted in a prior decision, "[w]here the claimed injury involves access to land, the required showing involves the specification of the land that the plaintiff intends to use that the challenged action will affect. Otherwise, we cannot be certain enough that the plaintiff will himself be among the injured." *Wilderness Society v. Griles*, 824 F.2d 4, 15 (D.C. Cir. 1987).

It makes no difference that "[t]he Government can hardly feign confusion" (Resp. Br. 29) about which lands were affected within the Green Mountain/South Pass region. The question is not whether we know where the affected acres are; anyone who reads the Federal Register can find that out. What matters is whether respondent proved a connection to those acres sufficient to support its standing to sue. After all, in *Sierra Club v. Morton*, 405 U.S. 727 (1972), the government undoubtedly was not "confused" about the location of Mineral King and Sequoia Na-

tional Park; but that did not avail the plaintiff when it failed to demonstrate a sufficient interest in those particular lands. See *id.* at 735.

Nor can respondent rest its standing on the fact that "the harm that comes from mining \* \* \* is not localized" (Resp. Br. 30). We freely acknowledge that mining may have an impact beyond the property actually being mined. But "obscured landscapes," "fugitive dust," "violat[ion] [of] noise levels," and the like (*ibid.*) do not confer standing on persons who use land hundreds of miles from the site, and thus lack a "distinct and palpable" interest in the premises (*Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)). As far as one can tell from her affidavit, Peterson has never been anywhere near the particular parcels opened to the staking of mining claims.<sup>13</sup>

Finally, contrary to respondent's assertion (Resp. Br. 31-32), this Court has *not* accepted claims like those contained in the Peterson affidavit. For example, in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), the Court held that plaintiffs had established their standing to raise a constitutional challenge arising from the construction of two nuclear power plants. But the plaintiffs' proof of standing in that case was quite specific: after a four-day hearing (*id.* at 72), the district court found that the operation of the plants would cause "a 'sharp increase' in the temperature of

<sup>13</sup> Indeed, because Peterson did not identify where she was, or what lands she was complaining about, the government was disabled from proving that the lands in question had never been mined, and that there were no prospects for mining in the future. See J.A. 73, 108 (detailing minimal number of mining claims filed on the 180,000,000 acres of land subject to terminations or revocations).

two lakes presently used for recreational purposes" by the plaintiffs (*id.* at 73). Respondent has offered no comparable evidence in this case.

Respondent's reliance (Resp. Br. 32, 37) on *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), is also misplaced. First, unlike the plaintiffs in *SCRAP*, respondent has never advanced "allegations which, if proved, would place [respondent] squarely among those persons injured in fact by the [government's] action \* \* \*." *SCRAP*, 412 U.S. at 690. Even if true, Peterson's central allegation—that she "use[s] federal lands, including those in the vicinity of the South Pass-Green Mountain area of Wyoming for recreational purposes and for aesthetic enjoyment" (Pet. App. 190a)—does not by its terms assert any "injury in fact by the [government's] action" in this case. To the contrary, Peterson could easily use and enjoy the vast expanse of the 2 million-acre South Pass-Green Mountain area without ever happening upon, or being in any way injured by, activities on the 0.225 percent of the land that was actually affected by the only challenged land action in this region.

Second, respondent fails to acknowledge *SCRAP*'s additional teaching that, while the simple allegation of specific and perceptible harm may suffice to withstand a motion to dismiss for lack of standing, on a motion for summary judgment the plaintiff must show that its allegations are "true and capable of proof at trial." *SCRAP*, 412 U.S. at 689. The assertion of injury in the Peterson affidavit was clearly not sufficient at summary judgment, when respondent bore an affirmative burden to establish this essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Respondent's claim, at bottom, is that Peterson used some land in the vicinity of a

huge area, a small fraction of which has been affected by challenged activities. As generous as it is, *SCRAP* does not support so extravagant an assertion of standing.<sup>14</sup>

In sum, like the court below, respondent has failed to breathe life into the Peterson affidavit.<sup>15</sup> Because

<sup>14</sup> The lower court cases cited by respondent (Resp. Br. 31 n.50) likewise provide no support for the proposition that vague allegations about use of land "in the vicinity" may satisfy standing requirements under Article III and the Administrative Procedure Act. See, e.g., *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 822-823 (D.C. Cir. 1976) (plaintiff's members lived in a county expected to receive 30,000 new residents as a result of placement of Trident missile base there); *Coalition for the Environment v. Volpe*, 504 F.2d 156, 163-164 (8th Cir. 1974) (plaintiff's representatives lived near, drove over, and passed through the precise site of a proposed 1,700 acre, 12,000 person development); *Committee for Jones Falls Sewage System v. Train*, 539 F.2d 1006, 1015 (4th Cir. 1976) (plaintiff's members—challenging the discharge of raw sewage into Jones Falls—"live in the neighborhood through which Jones Falls flows"); *Natural Resources Defense Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 807 (N.D. Ill. 1988) (in citizen suit challenging alleged pollution of Lake Michigan and Waukegan Harbor, affidavits asserted that individuals used the lake and the harbor by walking along their shores and swimming in them).

<sup>15</sup> Respondent places passing reliance (Resp. Br. 35-37) on the Erman affidavit, but, as noted in our opening brief (at 37-38 n.27), that affidavit is insufficient for the same reasons as the Peterson affidavit. In connection with the Erman affidavit, respondent asserts that Judge Williams, in his opinion dissenting from the earlier panel opinion, "stated that the Government \* \* \* conceded in oral argument that 'some of the acreage opened to mining was in the vicinity of lands used by one of [NWF's] members in Arizona.'" Resp. Br. 37. In fact, we made no such concession, and Judge Williams did not say we did. In the text of his opinion, Judge Williams referred to a "concession" at oral argument, but the accom-

the requisite proof does not “‘affirmatively appear in the record’” and “‘may not be gleaned from the briefs and arguments themselves.’” (*FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. at 608, 610), respondent lacks standing to challenge even the Green Mountain/South Pass termination.

b. Still less does respondent’s evidence support its challenge to the hundreds of other orders, affecting the remaining 178,000,000 acres. As the court below acknowledged (Pet. App. 13a), respondent’s lawsuit arises under Section 702 of the Administrative Procedure Act, 5 U.S.C. 702, which authorizes judicial review at the behest of a person “adversely affected or aggrieved by agency action.” Under that provision, a person aggrieved by a particular governmental order affecting particular lands may challenge that order in court. The suit authorized by 5 U.S.C. 702 is directed to the final “agency action” itself (embodied in that order); that provision does not authorize a more general judicial supervision of the

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panying footnote makes clear that “[c]ounsel for Mountain States,” and not the government, made that concession (which we disavow). See Pet. App. 90a & n.2. Moreover, that is exactly how the court below understood Judge Williams’ statement. See *id.* at 18a n.13. And neither of the other two record citations noted by the respondent (*id.* at 55a, 85a) reflects a concession by the government about standing.

Respondent also states that “[n]o defendant challenged the standing of the congressional intervenor.” Resp. Br. 10 n.17. Again, that is not so. Both the government and Mountain States filed motions opposing Representative Seiberling’s intervention on standing grounds. See Defendants’ Opposition to Motion to Intervene of Congressman Seiberling, filed November 4, 1985; Motion by Defendants Mountain States Legal Foundation and Mineral Exploration Coalition in Opposition to Motion to Intervene of the Honorable John Seiberling, filed November 8, 1985.

agency program or policy pursuant to which the particular order (the “agency action”) was adopted.

The present case illustrates the inappropriateness of overarching, “programmatically” assaults on governmental policy, rather than the specific “agency action” generated by that policy. Given the heterogeneous nature of the actions and lands in this case, it is entirely possible—likely, in fact—that some number of the challenged land actions (for example, the record clearing actions (see Pet. Br. 11 & n.10)) may have had absolutely no adverse effect on anyone. In such circumstances, it would be wholly inappropriate to assume injury-in-fact with respect to *all* of the challenged actions, absent some showing of injury with respect to each.<sup>16</sup>

Where, as here, a case-by-case inquiry into each land action is required, respondent does not have standing to challenge the whole range of actions, affecting tens of millions of acres of land, based simply on an alleged injury to a single person from

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<sup>16</sup> There is, moreover, no basis for—as well as no legal significance to—respondent’s assertion that the individual governmental actions at issue constitute, in the aggregate, a “program” to open lands to commercial development. As we have recounted in our opening brief (at 4, 7-8), the evidence showed that over a period of years beginning in the 1950’s, the agency undertook to rationalize existing withdrawals and classifications on a case-by-case basis. And it did not do so, as respondent repeatedly suggests, in an arbitrary manner. Indeed, in the one land action reviewed on the merits by the district court—the Green Mountain/South Pass termination, challenged in the Peterson affidavit—the court concluded that the evidence “completely answers plaintiff’s claims of inadequate land use plans, lack of conformance determinations, and insufficient opportunities for public participation.” Pet. App. 35a n.12.

action taken on a single parcel. None of the cases respondent cites (Resp. Br. 25 n.40) supports such a proposition, and we know of none that does. Rather, as this Court's decision in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 345 (1977), suggests, respondent's broad-based attack on a policy approach must give way to individualized proof with respect to the discrete agency actions. Standing principles require a showing of injury for each agency action as to which respondent seeks judicial relief. Without such a showing of particularized injury, trial of the merits will truly be, as Judge Williams put it, "adjudication in a vacuum" (Pet. App. 105a).

3. Finally, and again alternatively, respondent asks the Court (Resp. Br. 42-45) to remand the case to the court of appeals so that it may assess the sufficiency of the "informational standing" allegations contained in the Greenwalt declaration. There is no reason to do so: the district court found those allegations "conclusory and completely devoid of specific facts" (Pet. App. 32a), and its judgment on that score is correct. As we explained in our opening brief (at 41-43), respondent has never asserted that it sought to obtain specific information and was turned away, or that it sought to participate in the decisionmaking process but was denied access. For that reason, respondent's reliance (Resp. Br. 42, 44) on *Public Citizen v. United States Department of Justice*, 109 S. Ct. 2558, 2563 (1989), is of no help to its cause.<sup>17</sup>

<sup>17</sup> Respondent's reliance on *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), is mystifying indeed, since the plaintiff organization in that case predicated its standing on

Moreover, as respondent freely concedes (Resp. Br. 44), the documents it seeks do not exist, and respondent's claim is simply that documents be *created* on its behalf. But respondent's desire that the government generate information provides no basis for standing that would differentiate respondent from any other party that may wish to inform itself or disseminate information to others. To the extent respondent seeks to assert a right to require the government to generate information about particular governmental actions or lands, it must establish its standing by showing the requisite personal interest in those actions or lands. And, as we have explained, that is precisely what respondent failed to do in this case. In short, respondent's claim of standing on this score simply presents in a different guise the same standing question raised by respondent's other claims.<sup>18</sup>

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

JOHN G. ROBERTS, JR.  
Acting Solicitor General \*

APRIL 1990

the defendants' alleged racial steering practices and their effect on the organization's services to its clientele, not on any failure on defendants' part to create and furnish particular information.

<sup>18</sup> Thus, the Greenwalt declaration adds nothing of substance to respondent's claim of standing. See Pet. Br. 42 n.32.

\* The Solicitor General is disqualified in this case.

No. 89-628

No. 89-640

Supreme Court, U.S.

FILED

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CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1989

No. 89-628

MOUNTAIN STATES LEGAL FOUNDATION, ET AL.,  
*Petitioners,*

*vs.*

NATIONAL WILDLIFE FOUNDATION,  
*Respondent.*

AND

No. 89-640

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.,  
*Petitioners,*

*vs.*

NATIONAL WILDLIFE FEDERATION,  
*Respondent.*

*ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF AMICUS CURIAE OF  
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*Amicus Curiae* adopts the Appendix filed by the Federal Petitioners with their Petition for Writ of Certiorari in Docket 89-640. References to pages in that Appendix shall be stated as "App." followed by the page number(s).

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No. 89-628  
No. 89-640

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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1989

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No. 89-628  
MOUNTAIN STATES LEGAL FOUNDATION, ET AL.,  
*Petitioners,*  
*vs.*  
NATIONAL WILDLIFE FOUNDATION,  
*Respondent.*

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AND

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No. 89-640  
MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.,  
*Petitioners,*  
*vs.*  
NATIONAL WILDLIFE FEDERATION,  
*Respondent.*

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

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BRIEF AMICUS CURIAE OF  
AMERICAN MINING CONGRESS

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## INTEREST OF AMICUS CURIAE

American Mining Congress (a Colorado non-profit corporation) is a trade association composed of (1) producers of most of America's metals, coal, and industrial and agricultural minerals; (2) manufacturers of mining and mineral processing machinery, equipment, and supplies; and (3) engineering, consulting, and financial firms and institutions that serve the mining industry. Because of the wide-ranging and negative impact of NWF's suit on the mining industry, the American Mining Congress is keenly interested in the outcome of this case. This *Amicus Curiae* supports Secretary of the Interior Manuel Lujan, Jr., Director of the Bureau of Land Management Cy Jamison, the Department of the Interior, and Mountain States Legal Foundation in this case.

## INTRODUCTION AND PROCEDURAL HISTORY

The Withdrawal Review Program ("the Program") was mandated by Congress in the Federal Land Policy and Management Act of 1976 ("FLPMA"). FLPMA requires the Secretary of the Interior, by October 21, 1991, to conduct and complete a review of withdrawals<sup>1</sup> of public lands administered by the Bureau of Land Management ("BLM") and authorizes the Secretary to terminate withdrawals (other than those made by Congress). 43 U.S.C. 1714(l). Congress noted that administrative restrictions on public land use had increased and there had been a failure to examine past withdrawal actions to determine their continuing value. H.R. Rep. No. 1163, 94th Cong., 2d Sess. at 19 (1976). Accordingly, Congress established the Program to correct this problem of excess withdrawals.

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<sup>1</sup> FLPMA defines a "withdrawal" as "withholding an area of federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws . . . ." 43 U.S.C. 1702(j).

On July 15, 1985, National Wildlife Federation ("NWF") filed a suit against the United States Department of the Interior claiming that under the Program the BLM was improperly terminating more than 788 land classification and withdrawal orders on lands administered by the BLM. NWF complained that the termination of these orders could interfere with the enjoyment of the lands by NWF members. NWF prayed for immediate injunctive relief to (1) freeze land classifications and withdrawals as of their status on January 1, 1981 (a date four and one-half years prior to NWF's filing of the suit) and (2) enjoin the BLM from taking actions inconsistent with the classifications and withdrawals existing in 1981. Then, with the injunction in place, NWF would have the District Court require the BLM to repeat a multiple series of land planning studies and prepare an environmental impact statement ("EIS") on each individual land classification termination and land withdrawal revocation, an EIS on the cumulative effect of those actions, and an EIS on the Program itself. The effect of the relief sought by NWF would be to perpetuate indefinitely the withdrawals and classifications and, simultaneously, exclude virtually every land use, all contrary to Congress' purpose in establishing the Program.

The 180,000,000 acres of public land on which this NWF suit would exclude all resource development constitute more than one-half of all lands administered by the BLM and forty-four percent of all lands owned by the federal government in the western United States, excluding Hawaii and Alaska. Most of the known domestic resources of metallic minerals, other than iron, are situated in the western United States and there is a strong probability that the public land areas of the West hold greater promise for future mineral discoveries than any other region. Public Land Law Review Commission, *One Third of the Nation's Land*, 121, 122 (1970).

Congress has pronounced as a national policy that the domestic mining industry is essential to the United States' security and prosperity, 30 U.S.C. 21a, 1602-1605,

1801(a), and mandated that the public lands be managed in a manner to implement that policy, 43 U.S.C. 1701(a)(12). If NWF succeeds in freezing all economic uses on these vast areas of public lands, the resource base for mineral supply to this nation will be reduced drastically. Thus, the relief NWF seeks in this suit would be absolutely contrary to Congressional policy and to the nation's interests.

In support of its claim to have standing to make this challenge, and as evidence of the extent to which its members use this public land, NWF submitted affidavits from two members who claimed to recreate in the vicinity of certain public lands subject to the Program. (App. 187a-192a.) On the basis of these two affidavits, NWF would prohibit all but environmentalist uses on the 180,000,000 acres of federal public lands in question. The District Court initially upheld the evidence of standing as sufficient to survive a motion to dismiss and granted the preliminary injunction.<sup>2</sup>

The Court of Appeals, in a split decision, found that the District Court did not abuse its discretion in granting the preliminary injunction, *Burford I*, at 327 (App. 84a-85a)<sup>3</sup>, and upheld the District Court's finding that enough had been alleged by NWF as to its standing to survive the motion to dismiss. *Burford I*, at 311-314 (App. 48a-57a). Circuit Judge Williams, however, filed a vigorous dissent criticizing the granting of the preliminary injunction on NWF's slim proofs.<sup>4</sup> And, in a subsequent opinion

<sup>2</sup> *National Wildlife Federation v. Burford*, 676 F.Supp. 271, 277, 279 (D.D.C. 1985) (App. 119a-136a, 130a and 136a). See also *National Wildlife Federation v. Burford*, 676 F.Supp. 280 (D.D.C. 1986) (App. 137a-150a).

<sup>3</sup> "*Burford I*," the first opinion of the Court of Appeals in this case, is reported as *National Wildlife Federation v. Burford*, 835 F.2d 305 (D.C. Cir. 1987) (App. 38a-115a).

<sup>4</sup> In his dissent Circuit Judge Williams stated:

denying motions for rehearing, the Court of Appeals expressed its concern about the serious ramifications of this case and the fact that it had proceeded thus far on only cursory showings presented by NWF.<sup>5</sup> Subsequently, when the District Court undertook more deliberate consideration of the case on cross-motions for summary judgment, it granted judgment against NWF on the basis of lack of standing,<sup>6</sup> specifically finding that the NWF member affidavits were insufficient.

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The majority today upholds a district judge's self-appointment as *de facto* Secretary of the Interior over 180 million acres — nearly one-fourth of all federal lands and more than half of the public lands managed by the [BLM]. It does so without a showing that the BLM breached any legal requirement as to a single parcel of land. Even assuming such a breach, the record is barren of any hint that it was material or likely to harm plaintiffs' interests — much less irreparably. Unable to sanction such a judicial usurpation of power, I dissent.

835 F.2d at 327 (App. 85a).

<sup>5</sup> The Court of Appeals noted (emphasis added):

It has been over two years since the preliminary injunction was issued. As we stated in our opinion, "[t]his is a serious case with serious implications." 835 F.2d at 327. We noted then, and continue to believe, that some of the criticisms of the breadth and scope of the preliminary injunction offered in the vigorous dissent are not without force. *In addition, we are aware that the district court injunction has placed on "hold" for over two years a complex governmental effort to review and adjust its classifications of vast tracts of land. It is also beyond dispute that countless parties are affected by the uncertainties associated with the unsettled status of these lands.* For these reasons, we believe that the disposition of these millions of acres should not continue to rest any longer than necessary on the foundation of a preliminary injunction which was entered on consideration of the brief affidavits and cursory materials presented to the court below.

844 F.2d 889, at 889 (App. 117a-118a) (D.C. Cir. 1988).

<sup>6</sup> *National Wildlife Federation v. Burford*, 699 F.Supp. 327 (D.D.C. 1988) (App. 26a-37a).

The Court of Appeals reversed this judgment on the ground that since it had found there was sufficient standing in *Burford I* to survive a motion to dismiss, that finding was the law of the case even on a motion for summary judgment. *Burford II*, at 432-433 (App. 18a-20a).<sup>7</sup> The Court of Appeals further said that, in any event, the affidavit of NWF member Peggy K. Peterson alone was sufficient to support standing. *Burford II*, at 431 n. 13 (App. 18a).

From the *Burford II* decision, Petitions for Writ of Certiorari were filed by Mountain States Legal Foundation, et al., in No. 89-628 and by Manuel Lujan, et al., in No. 89-640. The Petition in No. 89-640 was granted by this Court on January 16, 1990. *Amicus Curiae* is informed that, as of the writing of this brief, the Petition in No. 89-628 remains pending.

### SUMMARY OF ARGUMENT

The Court should reverse *Burford II* because that opinion ignores the constitutional limits on the role of the federal judiciary. The essence of this dispute is whether NWF should be permitted to use the federal courts to change national policy and exclude mining and other resource uses on the vast areas of the public lands which are subject to this suit. This is a political question for Congress to decide, not a "case or controversy" for the courts to decide. If NWF wishes to reshape the national policy, it must do so through the democratic legislative and executive branches of the government and not through the judiciary. Accordingly, NWF's suit is barred by considerations more fundamental than standing. If this Court agrees that NWF is asking the courts to intrude on the representative branches of government, then it is not necessary to reach the question of

<sup>7</sup> "*Burford II*," the Court of Appeals opinion here under review, is reported as *National Wildlife Federation v. Burford*, 878 F.2d 422 (D.C. Cir. 1989) (App. 1a-25a).

whether the NWF member affidavits concerning standing were sufficient.

Further, in order to grant the relief sought by NWF, the District Court will be forced to review and administer an entire governmental program. Administration of federal agency programs is neither practicably nor legally the proper use of the federal judiciary. The vastness of the public lands requires that direction for their management be provided initially by broad programs, such as the Withdrawal Review Program, to be implemented by individual actions on specific land areas. If a person is injured by such a specific action, that person may have standing to seek redress in the courts for that action, but not for the entire Program guiding other actions which do not affect that person.

Finally, this Court should find that the standing evidence offered by NWF is defective under even the most liberal standing cases. First, the allegations of injury by NWF are fatally flawed for failing to identify with particularity any lands they use which are included in the Program, the specific other uses of those lands which would injure the NWF members, or the lands which would be damaged by those other uses. Second, the injury alleged by NWF does not support standing for the over-reaching and premature relief requested.

### ARGUMENT

#### I. THE SEPARATION OF POWERS DOCTRINE BARS NWF'S SUIT.

##### A. NWF's Suit Does Not Present A Justiciable Case or Controversy.

NWF's suit essentially seeks to have the judiciary run the BLM Withdrawal Review Program in accordance with NWF's view of what public land policy should be. But, it is the BLM which is charged with managing the public lands under the principles of multiple use and which is

bound to make its decisions concerning public land after considering the competing interests, as guided by the policies set forth in FLPMA and other national policies established by Congress. 43 U.S.C. 1701, 1732. The administration of the Withdrawal Review Program by the BLM is a political matter determined and delegated by Congress, not a justiciable question. The separation of powers doctrine requires the federal courts to limit their authority to justiciable questions and to refrain from the political aspects of government.<sup>8</sup> *Allen v. Wright*, 468 U.S. 737 (1984).

*Amicus Curiae* submits that the separation of powers doctrine is a concept even more fundamental than standing. Standing focuses on whether the particular plaintiff properly brings a case within the judicial limits of Article III of the United States Constitution. The separation of powers doctrine, though also rooted in Article III, focuses on the justiciability of the issue. If, in order to satisfy the plaintiff, the federal court must encroach upon the realm of the legislative or executive branch of the government, then the separation of powers doctrine bars the suit. *Allen*, above, at 759-760. Thus, the threshold inquiry is whether, under our tripartite system of government, federal courts should undertake the case.<sup>9</sup>

In *Allen*, at 759-760 (emphasis added), this Court stated:

The idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that the respondents' alleged injury "fairly can be traced to the challenged action" . . . . That conclusion would

<sup>8</sup> This issue was raised before the Court of Appeals, but is not squarely addressed in the *Burford II* decision.

<sup>9</sup> An analysis of this principle is provided in Coyle, "Standing of Third Parties to Challenge Administrative Agency Actions," 76 Cal. L. Rev. 1061, 1091-1093 (1988).

pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. *Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication.*

The very problem this Court warned against in *Allen* is the situation in this case. NWF has not complained of a specific violation of law which has in fact harmed any of its members. Instead, though complaining that there are general violations of the law, NWF in reality challenges the entire program the BLM has established to carry out the congressionally mandated reviews of public land withdrawals. This Court stated that it is inappropriate to use the judiciary to restructure the programs established by the executive branch:

When transported in the Art III context, [the principle that government be granted the widest latitude in the dispatch of its own internal affairs], grounded as it is in the idea of separation of powers, counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. *The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to "take Care that the Laws be faithfully executed."* US Const, Art II, § 3. *We could not recognize respondents' standing in this case without running afoul of that structural principle.*

*Allen*, at 761; emphasis added.<sup>10</sup>

<sup>10</sup> To be sure, Congress itself is guilty of intruding upon the sep-

More harm is done by allowing actions such as NWF's suit than simply an injudicious intrusion upon the proper functions of other branches of government. When special interest groups, such as NWF, succeed in convincing a court to undertake review of a governmental program, they obtain an inappropriate advantage in terms of greater clout and more attention than is warranted vis-a-vis all the other interests which should be considered in the formulation of public policy.<sup>11</sup> Like all advocates, special interest groups are not concerned with presenting to a court all relevant considerations which should be involved in forming public

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aration of powers by attempting to grant universal standing in some environmental legislation, such as in the Clean Air Act, 42 U.S.C. 7607(d), and in the Clean Water Act, 33 U.S.C. 1365. On the subject of these congressional intrusions it has been observed:

Justice Scalia believes that standing is ultimately related to separation of powers concerns. The power of Congress to expand standing is, therefore, inescapably limited. In Scalia's view, congressional approval, express or implied, to expanding standing "cannot validate judicial disregard" for the boundaries that exist between branches of government.

...

A universal grant of standing, even though an "acquiescence" of Congress to judicial intervention, forces courts to hear the claims of the majority because plaintiffs need not allege palpable injuries that set themselves apart from the general public. . . . The democratic process that inheres in the executive and legislative branches, and not the undemocratic process that inheres in the courts, should resolve and protect the interests of "all-inclusive" classes of citizens.

Alpert, "Citizen Suits Under the Clean Air Act: Universal Standing For the Uninjured Private Attorney General?," 16 Boston College Environmental Affairs L. Rev. 283, 304-305 (1988-1989); footnotes omitted; referring to Justice Scalia's "The Doctrine of Standing as an Essential Element of the Separation of Powers", 17 Suffolk U. L. Rev. 881 (1983).

It is important to note that here NWF is not suing on the basis of legislation where Congress has attempted a universal grant of standing.

<sup>11</sup> The proper forum for special interest groups to demand attention for their agenda is through the more deliberate and democratic legislature.

policy. Instead, they focus primarily on presenting only the issues which they hope will allow them to prevail in the matter under dispute.<sup>12</sup> The very fact that a special interest group has convinced a court to take a case indicates that group's notion of public policy has caught the court's attention and, perhaps, the court has allowed itself to become a vehicle or even a champion of the special interest group's view of public policy. This Court has admonished the federal judiciary to refrain from such judicial activism. See *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 865-866 (1984), wherein this Court stated:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of

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<sup>12</sup> Rabkin, Jeremy, *Judicial Compulsions: How Public Law Distorts Public Policy*, pp. 63-64, (1989).

the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones. . . .

Permitting special interest groups to bring broad policy lawsuits against administrative agencies is "essentially a means by which courts grant particular private advocates privileged claims on the conduct of public policy."<sup>13</sup> In his dissent in *Burford I*, Circuit Judge Williams charged that undue influence for the environmentalists' agenda was the very result in this case:

The injunction . . . makes no effort to minimize the *aggregate* harm to the public interests in both environmental preservation and alternative activities: the district court has allowed environmental interests, however weak and however trivially they may be at risk as to particular tracts, to sweep the other interests off the board.

835 F.2d at 340 (App. 114a–115a).

*Amicus Curiae* submits that these concerns are very real. If NWF succeeds in proceeding with this case, then the ability of the BLM to make judgments based on the many relevant policy considerations will be limited, with undue attention being given to NWF's view. The congressionally pronounced national policy that public lands should

<sup>13</sup> *Id.*, at 64.

be managed in a way which fosters domestic mining, thus, will be thwarted. As noted in the concurring opinion of Justice Kennedy, joined by Chief Justice Rehnquist and Justice O'Connor, in *Public Citizen v. U.S. Dept. of Justice*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 2558, 2573, 105 L. Ed. 2d 377 (1989), maintaining the separation of powers is one of the most vital functions of the Court. Special interest groups still may, and properly should, pursue their political agendas in the political realm of government.

Another problem (which will be further discussed in the next section of this argument) with cases such as NWF's is that the judiciary is asked to assume an enormous and time-consuming task. Instead of selecting one or even several BLM decisions resulting in some proposed activity on land which it could precisely locate and for which it might produce an injured member who actually used that land, NWF attached to its Amended Complaint (paragraph 18) a list of 788 BLM land actions, stating that its claim was not limited to those 788 land actions. NWF neither precisely located the lands involved in those actions for the court (a defect noted in the *Burford I* dissent, at 329 and 337; App. 89a–90a and 107a–108a), nor produced members who could claim injury as to any of them. NWF's goal was to have the court perform the work of the BLM while wearing NWF-supplied blinders. The District Court had monumental difficulties administering the preliminary injunction during the period it was in effect.<sup>14</sup> Thus, the problems that arise from suits such as NWF's dramatically reaffirm that the function of the judiciary must be kept separate from the legislative and executive functions of the government.

<sup>14</sup> As noted at pages 7–8 of the Federal Petitioners' brief in support of their Petition for Certiorari (Docket 89-640), several modifications of the preliminary injunction were necessitated to limit its original scope. In at least one instance, NWF itself was constrained to ask for relief. Congress, at the behest of affected parties, legislated other limits on the effect of the preliminary injunction.

### B. NWF's Suit Impermissibly Seeks Review of an Entire Governmental Program.

No matter what is thought of NWF's claims to have satisfied the required showings for standing (discussed below) and no matter what is thought of the minimal requirements which have been allowed to establish standing under cases like *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), and *Defenders of Wildlife, Friends of Animals v. Hodel*, 851 F.2d 1035 (8th Cir. 1988), this case is outside of the universe of cases that may properly be undertaken by the federal courts because it requires the judicial administration of an entire agency program.

This Court's opinions in *Allen*, above, and *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), affirm the rule that the nation's courts cannot be in the business of running governmental programs. Not only would such involvement in the daily affairs of the federal agencies run afoul of the separation of powers doctrine, it would also be a ludicrous use of judicial resources. In this case NWF is not challenging the validity of a regulation or even the application of a regulation to a particular set of facts. Instead, NWF is challenging the entire Program being carried out by the BLM on over a hundred million acres of public land. NWF sought to control too much with too little and, thus, by its own over-zealousness, brought a suit which cannot properly be maintained.

NWF, in its brief responding to the Petitions for Certiorari, would have this Court believe that this suit is no different from others where a particular federal agency action is challenged. And, NWF cites a string of cases in footnote 21 of that brief claiming that those cases support the notion that the federal courts have frequently engaged in reviews of entire programs. Each of those cases is readily distinguishable from this case and falls into one of the following categories: (1) single agency decisions (as opposed to

the 1,250 or so decisions in this case), (2) a single interpretation of one part of an agency's mandate, (3) specific regulations, or (4) the required geographic scope of a single EIS.<sup>15</sup> Thus, none of the "program review" cases relied upon by NWF supports the claims made by NWF.

NWF's attempt to salvage its standing by relying on *NAACP v. Secretary of Housing & Urban Dev.*, 817 F.2d 149 (1st Cir. 1987) is likewise unavailing. In the present case, NWF claims to be challenging a "pattern of conduct" rather than the hundreds of separate land use decisions by the BLM. The *NAACP* case did indeed allow a "pattern of conduct" challenge, but the focus was whether the Department of Housing and Urban Development was meeting its statutory goal of promoting fair housing. In fact, the court in *NAACP* expressly noted that the *NAACP* was not challenging the individual instances of agency action. Try as it will to claim otherwise, NWF is in fact challenging the 1,250 decisions made by the BLM. *Burford II*, at 430-431, n.12 (App. 16a).

NWF is dissatisfied that the BLM has not made environmental concerns supreme over all other factors the

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<sup>15</sup> The cases relied upon by NWF for review of an entire governmental program are: *UAW v. Brock*, 477 U.S. 274 (1986), interpretation of a benefits entitlement statute; *Oregon Environmental Council v. Kunzman*, 817 F.2d 484 (9th Cir. 1987), geographic scope of an EIS; *Blum v. Yaretsky*, 457 U.S. 991 (1982), determination of uniform level of benefits to be applied with respect to stated medical evaluations; *Watt v. Energy Action Educational Foundation*, 454 U.S. 151 (1981), choice of competitive bidding procedures under a statute requiring experimentation with different procedures; *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981), does not address standing, pertains to an agency policy statement; *Association of Data Processing Service Organizations, Inc., v. Camp*, 397 U.S. 150 (1970), single decision to allow banks to engage in a certain business; *Defenders of Wildlife, Friends of Animals v. Hodel*, above, single decision concerning exemption of projects in foreign countries from application of federal endangered species statute; and *National Wildlife Federation v. Hodel*, 839 F.2d 694 (D.C. Cir. 1988), challenge to twenty-one regulations, with proof of standing required as to each regulation.

BLM by law must consider. As noted in *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 97 (1983), the National Environmental Policy Act of 1982, 42 U.S.C. 4321, *et seq.*, ("NEPA") requires agencies to consider environmental impacts before acting, but it does not require environmental issues to occupy the entire field.

And finally, NWF claims that *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), aids its standing argument. Like *Oregon Environmental Council*, above, *Kleppe* is a challenge to the geographic scope of an EIS. The Sierra Club wanted to force the Interior Department to issue a regional EIS concerning northern plains coal mining. This Court rejected that claim on the ground that there was no proposal of regional mining to be evaluated. Thus, *Kleppe* hardly offers any support for NWF's position in this case.

## II. NWF FAILED TO ESTABLISH STANDING.

In holding that NWF had made an allegation of injury sufficient to establish standing, the Circuit Court below relied largely on *Sierra Club v. Morton*, 405 U.S. 727 (1972) and *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, above ("SCRAP"). If NWF's action did present a "case or controversy" (which it does not), then this case presents an opportunity for this Court to refine its holdings in *Sierra Club v. Morton* and *SCRAP* relating to standing to sue on environmental and public land issues.

### A. NWF Failed to Allege Recognizable Injury and Use of Particular Land Affected by BLM Action.

With respect to the asserted use of the lands affected by federal action, there is no relevant factual difference between *Sierra Club v. Morton*, above, and the present case. In *Sierra Club v. Morton* a ski area and attendant facilities had been proposed for construction on federal lands in an area of the Sierra Nevada mountains in California. The

Sierra Club alleged that it had a special interest in the conservation and sound management of national parks and forests and particularly of the lands on the slopes of the Sierra Nevada mountains. See *Sierra Club v. Hickel*, 433 F.2d 24, 29 (9th Cir. 1970). This Court said: "Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King [the site of the ski area] for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents." *Sierra Club v. Morton*, at 735. Here, the boilerplate allegations in the two NWF members' affidavits (App. 187a, 191a) that they "use the federal lands, including those in the vicinity of" a generalized area of BLM lands from which withdrawals had been revoked is substantially identical to the allegations in *Sierra Club v. Morton*. In neither *Sierra Club v. Morton* nor in the present case did the plaintiffs make sufficient allegations that any of their members used any of the particular lands in question. This was fatal to standing in *Sierra Club v. Morton* and is fatal to standing in the present case.

In fact, NWF has even less basis for standing in this case than the Sierra Club had in *Sierra Club v. Morton*. The Sierra Club objected to a specific proposed project (a ski resort) on a specific area of land. In the present case, NWF has not identified any specific proposed land use which could cause any injury, has not identified any specific land area which would be damaged, and has not identified any specific land area its members use or propose to use (other than "the federal lands"). Although this Court has broadened the categories of injury that may be alleged in support of standing to include aesthetic, conservational, and recreational values, this Court has not abandoned the requirement that identifiable damage to specific lands and particular injury to the plaintiff be alleged. *Sierra Club v. Morton*, at 734-735.

*Wilderness Society v. Griles*, 824 F.2d 4 (D.C. Cir. 1987), involved a challenge by the Wilderness Society and the Sierra Club to a BLM policy decision not to charge

submerged lands against the grant of acreage entitlements for Alaska and Alaskan natives. In the *Griles* case it was held that affidavits of members of the plaintiff groups, wherein it was claimed that the members visited federal lands throughout the State of Alaska, were *insufficient* to support standing. The Court of Appeals reasoned that members failed to name the specific lands they intended to visit which would be taken out of federal ownership by the challenged BLM policy. The very same flaw in standing proof defeats this case. NWF's member affidavits claimed nothing more specific than recreating "in the vicinity of" only a relatively small part of the enormous expanses of federal land affected by this suit.

#### **B. The *SCRAP* Decision Does Not Control in This Case.**

*SCRAP* is clearly distinguishable from the present case on at least two grounds. First, in *SCRAP* the plaintiffs did assert that they used the lands and breathed the air which they claimed would be damaged by an Interstate Commerce Commission approval of a freight rate surcharge. This Court found that the plaintiffs' allegations were sufficient to establish the "identifiable trifle" of injury necessary to show standing in that case. *SCRAP*, at 689-690. In the present case, however, the fact remains that NWF did not allege that any of its members used any of the particular lands which are subject to the Program. Therefore, not even an identifiable trifle of injury could be alleged by NWF members with respect to those lands subject to the Program.

Secondly, this Court held in *SCRAP* that a plaintiff must allege that he will "be perceptibly harmed by the challenged government action, not that he can imagine circumstances in which he could be affected by the agency's action." *SCRAP*, at 688-689. In *SCRAP*, the freight surcharge could go into effect without further governmental action and cause the events to occur which the plaintiffs alleged would cause damage. *SCRAP*, at 672-674. In contrast, as discussed further below, the government's actions

carried out under the Program cannot create any injury to NWF. It is not unless and until the BLM takes additional actions proposing to authorize particular uses to be carried out on particular lands that NWF could allege injury and then only if NWF asserts that its members use those particular lands. At this stage, NWF only imagines circumstances in which its members would be harmed.

#### **C. The Program Causes No Injury.**

This Court has ruled that the alleged injury justifying standing must be fairly traceable to the challenged action, *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976), and that the standing question bears close affinity to the question of ripeness — whether the harm asserted has matured sufficiently to warrant judicial intervention, *Warth v. Seldin*, 422 U.S. 490, 499, n. 10 (1975). In the present case the action complained of is the publication of withdrawal and classification revocation notices in the *Federal Register*. This publication merely allows the BLM to (1) consider any applications it may receive to permit resource uses on those lands and (2) evaluate the conditions under which such uses may be carried out.

NWF is premature in seeking to enjoin the revocations because it can suffer no injury until third parties apply for and receive authorization to carry out activities on the lands. Whether a land exchange will be approved, whether BLM lands will be sold, or whether rights of way will be issued, all lie within the discretion of the Secretary of the Interior. 43 U.S.C. 1716(a), 1713, 1761. Similarly, mineral leases on public lands are issued or withheld at the discretion of the Secretary. 30 U.S.C. 201, 211, 226(a), 241(a), 261, 271, 281. Further, as pointed out in the dissent in *Burford I*, at 339 (App. 111a-113a), activities conducted under the mining laws are subject to environmental review under NEPA and (for operations disturbing more than five acres) subject to BLM approval, both of which provide for public

notice and consideration of public comments.<sup>16</sup> 43 U.S.C. 1732; 43 C.F.R. 3809.1-4, 3809.2.

Until there is the further event where the BLM considers the approval of a proposed land use, or at least until an application has been made for use of some of these lands, any allegation by NWF of injury or threatened injury is premature. Therefore, NWF could not properly allege that the challenged withdrawal terminations and classification revocations in themselves cause any injury to anyone, much less to its members, even if the members had identified and alleged they used the lands in question.

#### **D. The Standing Requirement and Showing of Injury Are Not Satisfied in This Three-Party Case.**

Cases such as *Sierra Club v. Morton*, above, and the present case, in which a government action allows a third party who is not before the court to respond in a manner that may injure the plaintiff, have been referred to as "three-party cases." See *Wilderness Society v. Griles*, above, at 12. This Court has observed that when an alleged threatened injury could result only from the action of some third party not before the court, the indirectness of the injury weakens the links in the chain of causation and can make it substantially more difficult to meet the standing requirement. *Allen*, above, at 758-759.

In *Allen*, this Court found that it was entirely speculative whether the withdrawal of a tax exemption from

<sup>16</sup> In addition to these management controls applying to activities conducted pursuant to the mining laws on public lands, an entire regime of federal and state land use and environmental permitting requirements apply to all mineral exploration and mining operations wherever they are conducted. Virtually all of those permitting procedures require public notice and the opportunity for public participation in the permitting processes. See 5 *Am. L. of Mining*, Chapter 166; Title XV (2d ed. 1989).

any particular school would cause parents and school officials to react in a way that would have an ultimate significant impact on the racial composition of public schools and, therefore, the parents of minority school children could not establish the necessary standing to challenge the tax exemption. *Allen*, at 759. In this case, the links in the chain of causation are even weaker because, not only would a third party resource developer have to respond to the Program, but any threat of injury to NWF would require the additional speculation that the BLM would also respond by approving a land use in a particular area.

The *Griles* decision is remarkable because it also is a three-party case dealing with public lands decided by the District of Columbia Circuit which reached a result opposite of that in *Burford II* even though it was decided by two of the same Circuit Judges who decided *Burford II*. The Circuit Court made the following observations in *Griles*:

Where the alleged injury involves access to land in a three-party case, as in *Sierra Club*, *SCRAP*, and the case at bar, the judgment regarding likelihood of injury turns on whether the plaintiff's future conduct will occur in the same location as the third party's response to the challenged governmental action. Otherwise, the threat of injury would be too amorphous or uncertain; it would be no greater for the plaintiff than for any person simply opposed to the governmental action in question.

824 F.2d at 12.

In light of *Griles*, it must be considered whether the Circuit Court may have reached its conclusion in *Burford II* because it failed to realize that this case, like *Griles*, is a three-party case in which NWF was not threatened with any injury until a third party sought and was granted authorization from BLM to conduct activities on the lands.

That the *Burford II* court failed to realize this is reflected in the following statement by the court:

Once the lands in dispute are removed from Government regulation or protection under the [Withdrawal Review] Program, and made available for private mining and other developmental uses, NWF would have no claim against those in control of the land development projects.

*Burford II*, at 429, n. 10 (App. 12a). This statement is plainly mistaken. As noted above, the dissent in *Burford I* correctly understood that, even in the case of mining, governmental reviews and approvals are still required after the lands have been opened to use.

NWF failed to properly allege injury in the present case, not only because it did not allege that its members use any of the lands in question, but also because it was impossible to identify which of the lands in the Program will be the subject of third-party responses (i.e., applications for leases, permits, or plan of operation approvals) and it was impossible to identify on which of those lands the BLM may consider granting approvals. In this case, actions by third parties and then further action by the BLM are required before NWF could properly allege there would be any injury to NWF. This is in contrast to *SCRAP* in which no further action by third parties or the government was necessary for events to occur which might injure those plaintiffs.

**E. Nonspecific Allegations of Injury in Two Geographic Areas Cannot Extend Standing to Challenge the Entire Program.**

Even if NWF could have established standing with respect to the two specific withdrawal revocations and classification terminations from lands in the vicinity of the

lands which two of its members alleged they used, this allegation of minimal injury in two geographic areas is certainly not strong enough to spread across the entire western United States and envelop into this litigation some 1,250 individual withdrawal revocations and classification terminations on more than 180,000,000 acres of public land. The Court of Appeals stated that "the applicable law governing standing requires that plaintiffs be injured by only one of the terminations" (emphasis by the court) in order to challenge the entire Program, citing *UAW v. Brock*, above, and *Warth v. Seldin*, above. *Burford II*, at 431, n. 12 (App. 16a). These cases relied upon by the Court of Appeals clearly do not support the extension of any NWF standing to all of the land areas and management actions involved in the Program and in this case.

*UAW v. Brock* simply held that it is not necessary for all members of an association to have standing in their own right for the association to have standing to challenge a Secretary of Labor policy respecting eligibility for supplemental state unemployment insurance benefits, so long as some members of the UAW could show they were injured. *UAW v. Brock*, at 284-286. In *Warth v. Seldin*, this Court denied standing to all of the individual and association plaintiffs in that case, but observed in *dicta* that "The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action. . . ." *Warth v. Seldin*, at 511. The issue raised in both of those cases obviously is not an issue in this case. The number of NWF members who can allege they were injured is not in question in this case and no party has contended that NWF must allege that all of its members were injured. Therefore, neither *UAW v. Brock* nor *Warth v. Seldin* supports the holding in *Burford II* that the establishment of standing with respect to one area involved in the NWF affidavit extends that standing to hundreds of other BLM land areas and some 1,250 BLM actions.

The Court of Appeals also set forth the proposition that if the Peterson affidavit were found sufficient for standing by itself, NWF may assert the interests of the general public with respect to the entire Program. *Burford II*, at 431-432, n. 13 (App. 18a). In support of that proposition, the court cited *Sierra Club v. Morton*, above, and *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978). In *Sierra Club v. Morton*, this Court stated that once a plaintiff establishes standing, he may assert the interests of the general public in support of his claims for equitable relief. *Sierra Club v. Morton*, at 740, n. 15. That statement, however, was made with reference to an attack on a single ski resort project. Nothing is even intimated in that case that would allow the Sierra Club to extend its standing to assert the general public interest in challenges to all other ski areas proposed on public lands in the western United States.

*Sierra Club v. Adams* involved the Sierra Club attempting to stop construction of a highway in the nations of Panama and Colombia. The Sierra Club first obtained an injunction against the United States' participation until an EIS was prepared and then obtained another injunction based upon three deficiencies in the EIS. The Court of Appeals simply held that once the Sierra Club established standing with respect to one issue in the EIS (spread of hoof and mouth disease) it could challenge other issues (effect of the highway on Indians in Panama and Colombia) on which the Sierra Club may not otherwise have had standing. Again, this case involved a single project and a single area of land like *Sierra Club v. Morton*. It did not determine that the Sierra Club, once having established standing with respect to the United States' participation in that highway, would have standing to challenge a United States program of participating in any other highways in South America. *Sierra Club v. Adams*, therefore, provides no authority for the conclusion reached by the Court of Appeals that, if NWF could assert the public interest in the one area in which the

court said NWF had established standing, NWF could assert the public interest for each of the remaining 1,250 or so individual classification terminations and withdrawal revocations.

## CONCLUSION

The *Burford II* decision of the Court of Appeals for the District of Columbia Circuit should be reversed and the decision of the District Court for the District of Columbia District which dismissed NWF's suit should be reinstated.

Respectfully submitted,

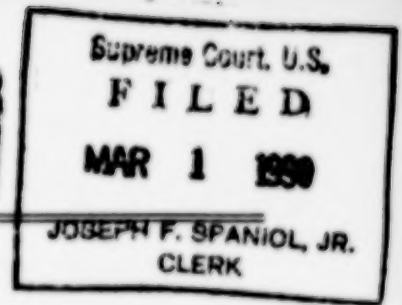
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In The  
**Supreme Court of the United States**  
October Term, 1989

MANUEL LUJAN, JR.,  
Secretary of the Interior, et al.,  
*Petitioners,*  
v.

NATIONAL WILDLIFE FEDERATION, et al.,  
*Respondents.*

On Petition for Writ of Certiorari to the United States  
Court of Appeals for the District of Columbia Circuit

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL  
FOUNDATION IN SUPPORT OF PETITIONERS**

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL  
FOUNDATION IN SUPPORT OF PETITIONERS

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**INTEREST OF AMICI**

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioners. Written consent to the filing of this brief has been granted by counsel for all parties. Copies have been lodged with the Clerk of the Court.

PLF is a nonprofit, public interest law firm based in Sacramento, California, with a branch office in Anchorage, Alaska. PLF has over 20,000 supporters throughout the United States and has the primary purpose of litigating in the public interest and in the defense of individual freedoms, private property rights, and the free enterprise system. PLF is currently representing a variety of public interest litigants in federal litigation.

For example, PLF is representing several mining associations in Alaska in litigation brought by a coalition of environmental groups led by the Sierra Club over the proper management and regulation of small placer gold mines on certain federal lands in Alaska. PLF is representing mining associations in a challenge to the Environmental Protection Agency's (EPA) water quality regulations. PLF is currently representing California water districts in a dispute over federal water allocation in the central valley. PLF has represented timber producers in cases dealing with timber practices and environmental regulation. And it has represented ranchers in litigation over the environmental regulation of cattle grazing.

These environmental cases are a primary reason for the existence of the Foundation—to represent in environmental cases the public's interest in sound resource development. More often than not, the Foundation represents organizations who have intervened in litigation originally brought by environmental groups against the federal government. The doctrine of standing is crucial to each one of these cases. The terrible expense and uncertainty engendered by these lawsuits places a substantial burden on many members of the public—but

especially on consumers and public land users such as cattlemen, miners, and loggers.

The Foundation's interest in the outcome of this lawsuit is directly tied to its ability to support the public's interest in environmentally sound resource development. The organizations represented by PLF intervened in the cases described above because the federal government, with its many conflicting statutory mandates, is often not in a position to represent the actual public land users—as opposed to the federal public land regulators.

Similarly, the Foundation often finds itself representing parties in bringing suit *against* the federal government. Here too, standing is a crucial issue. While PLF supports the federal government in the present case, PLF's interests are not always coincident with those of the government. It is likely that PLF is more concerned than the federal government with upholding the public's right to sue the government—when there is someone or some organization that is directly and recognizably injured by a federal policy.

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#### OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED, AND STATEMENT OF THE CASE

Amicus curiae, Pacific Legal Foundation, relies upon and adopts petitioners' statement and description of the opinions below, jurisdiction, statutes involved, and statement of the case.

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## INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case involves 180 million acres of federal land and whether respondents have standing to sue based on allegations of use "in the vicinity" of 4,500 acres.

Federal litigation has almost become a panacea to all the world's ills—major and minor. The axiom "don't make a federal case out of it" has become meaningless. The involvement of the federal courts in just about every aspect of the affairs of the republic and the lives of its citizens has almost become a fait accompli.

It was fear of this very trend that stirred heated debate during the ratification of our Constitution. There was a sizable faction that believed that the federal judiciary would usurp the power of the states. The opponents to ratification were reassured, however, that this was not the intent of the document, and that the structure of the Constitution would prevent such usurpation. And until recent times, the federal courts respected the fears of the anti-federalists. The courts moved cautiously before entering into an arena that could conceivably be considered more appropriately in the province of the executive or the legislative branch of government.

Yet times have changed. The federal government has legislated in subjects and fields that would have been an anathema, or at least inconceivable, 200 years ago. And with the legislation, the federal courts have followed. This is as it should be because the courts are necessary to enforce, interpret, and, when necessary, curtail federal legislation wherever it is found.

But just because the federal judiciary has found it necessary to become involved in an unprecedented array of controversies, does not give it license to exercise unlimited jurisdiction. It does not have the power to rush pell-mell into all manner of controversies simply on the basis of a few allegations of a highly attenuated "interest" from a few discontented individuals. It does not have the power to be the ultimate resolver of every dispute imaginable. Instead, the jurisdiction of the courts extends no further than that granted by the Constitution and Congress.

In public land cases, individuals with an economic stake in the outcome of the litigation have standing. Others do not unless some other plainly discernible interest is presented.

The present case is a prime example of the danger of unlimited jurisdiction run amok. When a vaguely worded affidavit by one individual can provide sufficient basis to throw the management of 180 million acres of federal land into a tailspin, the courts have gone too far. The decision below must be reversed.

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## ARGUMENT

### A. The Framers of the Constitution Envisioned a Powerful Judiciary— Which Would Not Usurp the Power of the Other Branches of Government

Our federal Constitution was not ratified without some trepidation. Having so recently thrown off the shackles of one tyrannical government, we were not

ready to embrace another. This fear of renewed tyranny was at the heart of the debate over the ratification of our Constitution. It was this debate that shaped the final structure and understanding of the Constitution.

The anti-federalists were fearful of the federal judiciary. We recognize in hindsight that many of the fears were unjustified, or that the benefits of a strong judiciary have outweighed the supposed harms. Nevertheless, an understanding of the fears expressed during the ratification debates helps explain the considerations that, until recent times at least, shaped the role played by the courts in the exercise of only limited jurisdiction.

The fears of the anti-federalists were centered on two interconnected attributes of the judiciary: its independence and the accompanying power to usurp both the states' and the federal government's legislatures.<sup>1</sup>

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<sup>1</sup> The problem of the judiciary overwhelming state sovereignty is not directly germane to the issues in the present case. The fear of such usurpation, however, is an essential element to an understanding of the overall reservations to an all-powerful judiciary. For example, Brutus wrote:

"Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial." Brutus, "Essay XV" (Mar. 20, 1788) reprinted in *The Anti-Federalist* 186, ¶ 2.9.195 (Storing ed., as abridged by Dry 1985).

Similarly, according to the Pennsylvania minority:

"The judicial powers vested in Congress are also so various and extensive, that by legal ingenuity they may be extended to every case, and (continued)

Concerns over the perceived excessive independence of the judiciary are embodied in remarks such as these by Brutus:

"[The framers] have made the judges *independent*, in the fullest sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself." Brutus, "Essay XV" (Mar. 20, 1788) reprinted in *The Anti-Federalist* 183, ¶ 2.9.189 (emphasis in original).

Alexander Hamilton, however, saw the nature of the independent judiciary in a different light. He saw it as a necessary counterforce to the Legislature:

"In a monarchy [an independent judiciary] . . . is an excellent barrier to the despotism of the prince: In a republic it is a no less excellent barrier to the encroachments and oppression of the representative body." *The Federalist* No. 78, 393 (May 28, 1788) (A. Hamilton) (Bantam ed. 1982) (*The Federalist*).

In a similar vein, Hamilton quoted Montesquieu for the truism that "there is no liberty, if the power of

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thus absorb the state judiciaries, and . . . effect a consolidation of the states under one government." "The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents" (Dec. 18, 1787) reprinted in *The Anti-Federalist* 212, ¶ 3.11.28 (Storing ed., as abridged by Dry 1985).

judging be not separated from the legislative and executive powers.' " *Id.* at 394 (quoting Montesquieu, *Spirit of Laws*, Vol. 1 at 181).

It is this view that ultimately prevailed as exemplified both by the ultimate passage of the Constitution and in the seminal case *Marbury v. Madison*, 5 U.S. 137 (1803). Thus the independence of the judiciary would allow it to act as a countervailing force to the Legislature.

But stating that the judiciary should be independent from the Legislature is not enough. The question remains—what is the precise relationship between the two bodies? What is to keep the judiciary from usurping the will of the Legislature? It is apparent that Hamilton was unimpressed by such concerns:

"It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power; *from the objects to which it relates; from the manner in which it is exercised; from its comparative weakness, and from its total incapacity to support its usurpations by force.* And the inference is greatly fortified by the consideration of the important constitutional check . . . the power of instituting impeachments."<sup>2</sup> *The Federalist*

<sup>2</sup> The tenor of the present case, of course, involves more of an usurpation of the power of the executive—who does not have the independent power to impeach the judiciary.

No. 81, 411 (May 28, 1788) (A. Hamilton) (emphasis added). See also *The Federalist* No. 78, 396.

Of course, one of the most powerful checks upon judicial usurpation of legislative authority has been the judiciary's exercise of self-restraint—the "objects to which it relates; from the manner in which it is exercised." *Id.* at 411. The doctrine of standing is a key element of this self-restraint.

It is the exercise of such self-restraint that helps still the fears that were expressed by the opponents of the Constitution. Brutus noted that the courts would interpret the Constitution, not necessarily according to its letter, but to its "spirit and reason." Brutus, "Essay XII" (Feb. 7, 1788) reprinted in *The Anti-Federalist* 169, ¶ 2.9.149. Brutus believed that this inclination would lead to a troubling and unlimited exercise of jurisdiction where

"[t]he courts . . . [will] take cognizance of every matter, not only that affects the general and national concerns of the union, but also of such as relate to the administration of private justice, and to regulating the internal and local affairs of the different parts." Brutus, "Essay XII" (February 7, 1788) reprinted in *The Anti-Federalist* 169, ¶ 2.9.150.

See also Centinel, "Letter 1" (Oct. 5, 1787) reprinted in *The Anti-Federalist* 17, ¶ 2.7.14 (on the sophistry used by English courts to extend jurisdiction).

In hindsight, more often than not the assurances of Alexander Hamilton on the power of the judiciary have proven to be more prescient than the fears of Brutus or the other opponents to ratification.

But with the present case, it is time to reexamine the efficacy of the doctrine of judicial self-restraint. The judiciary's usurpation of the power of another branch of government is apparent when a District Court takes on a case involving the management of 180 million acres of federal land—when the plaintiffs have been unable to demonstrate *any* distinct and unambiguous interest in the land. In such a case the doctrine of standing must be rigorously applied—in order to avoid the very result feared over 200 years ago during the ratification debates.

**B. The Doctrine of Standing Is an Essential Element to Judicial Self-Restraint and the Avoidance of Usurpation of Power**

**1. Standing Should Be Denied to Persons Without an Actual Stake in the Controversy at Hand**

Traditionally, federal courts have refused to hear a cause of action unless an actual case or controversy has been presented. In order for there to be standing to bring suit, federal courts have established an "injury-in-fact" test to determine whether there is sufficient adversity to meet the requirement that there has been an actual case or controversy. As articulated by this Court in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982): "It tends to assure that the legal question presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."

The specific "injury-in-fact" requirement precludes the presence of standing for a generalized grievance that is common to all citizens—such as disagreement with general land management policies. Thus "the Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Valley Forge*, 454 U.S. at 475 (quoting *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975)). See also *United States v. Richardson*, 418 U.S. 166, 180 (1974); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 217-18 (1974) (no standing for an "interest as 'undifferentiated' from that of all other citizens"); *Flast v. Cohen*, 392 U.S. 83, 106 (1968).

The finding of whether an injury-in-fact actually exists, or whether a party has a personal stake in the outcome of the litigation, has been distilled into a three-part test by this Court. First, there must be a "distinct and palpable" injury to the plaintiff, *Warth v. Seldin*, 422 U.S. at 501, be it "threatened or actual," *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973). Second, there must be a "'fairly traceable' causal connection" between the injury and the challenged conduct of the defendant, *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976). Third and finally, there must be a "substantial likelihood" that the relief requested will redress or prevent the injury. *Duke Power*, 438 U.S. at 45; *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 264 (1977).

An additional and related requirement that must be met is that the party claiming to be aggrieved must lie

within the "zone of interest" protected by the statute or constitutional provision. *Valley Forge*, 454 U.S. at 475; *Simon*, 426 U.S. at 39 n.19; *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970).

Unlike the actual users of the public lands (such as miners, loggers, and cattlemen) respondents have met none of these tests in the present case. As ably demonstrated by petitioners, an allegation that a person uses land "in the vicinity" of an area affected by a land management decision is not at all specific enough to demonstrate any actual or potential injury. Second, because over 99% of the subject land has always been open to mineral entry, there is no showing of any "fairly traceable causal connection" between the federal action and any further "injury." (There has always been potential mineral activity "in the vicinity" of the respondents' affiant.) Third, even if the respondents were ultimately successful in closing the 4,500 acres to mineral entry, there is no showing of any "substantial likelihood" of relief—because there will always be potential mineral activity on the public lands, in the vicinity of these 4,500 acres, which might "injure" respondents.

In short, respondents' allegations of injury and standing border on the trivial, absurd, and almost metaphysical. The allegations even fall outside the case that established the outer limits of standing: *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). It should first be noted that *SCRAP* primarily involved standing under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331. Many of the allegations in the present case revolve around the Federal Land Policy and Management Act (FLPMA),

43 U.S.C. § 1714, which has a much narrower scope than the "human environment" of NEPA. Whether respondents fall within the "zone of interest" of NEPA does not necessarily mean they fall within the "zone of interest" of FLPMA.<sup>3</sup>

In any event, great caution must be taken before extending the *SCRAP* principles beyond the facts of that case. NEPA involves an extraordinary breadth of human affairs—the whole human environment. NEPA is typical of modern federal statutes that have expanded the sphere of federal influence well beyond anything envisioned 200 years ago. This trend requires that the judiciary exercise caution lest its jurisdiction extend beyond the already enlarged sphere of federal involvement. Thus, it would be an unwise extension of federal judicial power to confer standing on any person concerned about the human environment just because there is some federal action with a tenuous relationship to that human environment. With such unfettered jurisdiction, there would be nothing left of judicial self-restraint. The fears of the opponents of ratifying the Constitution would then be finally realized, despite the most sincere assurances of Hamilton.

## 2. Standing Should Be Preserved for Public Land Users with an Actual Stake in Litigation

The argument that standing should not be extended to people with mere generalized grievances over the state

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<sup>3</sup> Indeed, *SCRAP* may represent something of an anomaly that should be confined to its facts. That is to say, *SCRAP* involved issues of recycling at a time when the interrelationship between tariff rates, recycling, and the use (continued)

of the human environment does not mean that individuals with plainly tangible interests in the outcome of litigation should not be granted standing. In public land cases such as the present one, there are potential parties that are especially deserving of standing—those individuals and organizations who actually use the public lands to earn a living and who have a clearly defined economic stake in the lands. Thus holders of mining claims, timber leases, or grazing permits have the requisite interest for standing in suits that will affect those claims, leases, or permits.

If standing were not allowed for such economic interests, there would be an untenable extension of federal power over the liberty of these miners, loggers, and ranchers. This extension of federal powers would be without recourse to the courts. Hamilton's promise of a counterforce to the "encroachments and oppression of the representative body" then would not be realized. Judges would no longer be "an essential safeguard against . . . injury of the private rights of particular classes of citizens, by unjust and partial laws." *The Federalist No. 78* at 397-98.

The doctrine of standing must be revitalized. Parties that have a clear and unambiguous stake in the outcome of a lawsuit should be granted the ability to participate in federal legislation. Parties without such an interest should take their grievances elsewhere.

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of the out-of-doors in the Washington, D.C., area may have been more manifest than it is today.

Similarly, parties with a definite economic stake in the outcome of ongoing litigation should be liberally permitted to intervene. Thus, the principles of standing and intervention should have been construed in favor of parties such as ASARCO in the present case. Likewise, when loggers are affected by NEPA-based arguments, as they were in *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989), *cert. denied*, 109 S. Ct. 3229, the loggers should be allowed to participate in the litigation. (They were not allowed in *Portland Audubon*.) A principle should be established that those who actually earn a livelihood from the public lands have at least as much right to participate in litigation as those who have only the most attenuated environmental interests.

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## CONCLUSION

Judicial self-restraint, as embodied in the doctrine of standing, is vital if the fulfillment of Hamilton's promise of a benign judiciary is to be maintained. If, however, standing is to be granted for all manner of abstract, theoretical, and fanciful claims, then there will be no territory of human endeavor beyond the jurisdiction of the courts. And if the jurisdiction of the courts is to be without limit, then we will finally be embarking upon a voyage to the land of tyranny as described by the anti-federalists two centuries ago.

Standing should be denied to parties without a clear and discernible interest in the stake of litigation. The decision of the court below should be reversed.

DATED: March, 1990.

Respectfully submitted,

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No. 89-640

Supreme Court, U.S.

FILED

MAR 2 1990

JOSEPH F. SPANIOL, JR.  
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1989

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,  
ET AL., PETITIONERS

v.

NATIONAL WILDLIFE FEDERATION, ET AL.

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## JOINT APPENDIX

KATHLEEN C. ZIMMERMAN  
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PETITION FOR WRIT OF CERTIORARI  
FILED OCTOBER 18, 1989  
CERTIORARI GRANTED JANUARY 16, 1990

BEST AVAILABLE COPY

1989

# In the Supreme Court of the United States

OCTOBER TERM, 1989

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No. 89-640

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,  
ET AL., PETITIONERS

v.

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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85-2238

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NATIONAL WILDLIFE FEDERATION

v.

BURFORD, ET AL.

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RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
7/15/85	1	COMPLAINT; * * *.
7/15/85	2	MOTION of pltf for preliminary injunction; * * *.
8/19/85	7	AMENDED COMPLAINT.
9/16/85	23	ORDER permitting the Mountain States Legal Foundation and the Minerals Exploration Coalition, Inc. to intervene as party defts.
12/4/85	50	ORDER granting pltf.'s motion for a preliminary injunction; enjoining defts. from taking certain action; enjoining certain persons holding interests in lands that were the subject of Classification terminations or withdrawal revocations since 1-1-81 from taking certain action; directing defts. to publish this order in the Federal Register; directing pltf. to post security in the amount of one Hundred dollars (\$100); * * *.

DATE	NR	PROCEEDINGS
12/4/85	51	ORDER denying defts.' motion to dismiss.
12/4/85	52	ORDER granting the motion to intervene of Congressman Sieberling.
12/16/85	56	MOTION by deft-intervenors Mountain States Legal Foundation, et al. for reconsideration of preliminary injunction, and denial of motion to dismiss, or in the alternative, to amend the judgment to certify the issue of non joinder to the Court of Appeals under 28 U.S.C. § 1292(b).
12/16/85	59	MOTION by defts. to amend, Reconsider and Clarify the Court's Order of 12/4/85.
2/10/86	84	ORDER denying the motions by the federal defts. and by deft.-intervenor Mountain States Legal Foundation for reconsideration, and by deft.-intervenor to amend the judgment to certify the issue to the Court of Appeals.
2/10/86	86	ORDER granting pltf's motion for a preliminary injunction; enjoining defts. from taking certain action; directing publication of this order in the Federal Register; setting injunction security in the amount of \$100.00 * * *.
3/7/86	101	ORDER filed 3/6/86 granting the motion to intervene of the Trust for Public Land for the limited purpose of determining whether proposed land

DATE	NR	PROCEEDINGS
		exchange is prohibited under Court's order of 2-10-86; directing that the federal defts. issuance of a patent with respect to the land exchange is not exempt under terms of the order.
4/11/86	113	NOTICE of appeal by Mountain States Legal Foundation from order entered 2/10/86; * * *.
4/11/86	114	NOTICE of appeal by Federal deft. from order entered 2/10/86; * * *.
4/14/86	116	ANSWER of deft-intervenors Mountain States Legal Foundation and Mineral Exploration Coalition, Inc., to pltffs amended complaint for Declaratory and Injunctive relief.
4/15/86	119	ORDER filed 4/14/86 granting the Trust for Public Lands intervention for the full course of this proceeding.
4/16/86	120	ANSWER by defts. to complaint of John F. Seiberling, pltf-intervenor.
4/16/86	121	ANSWER by defts. to pltffs amended complaint.
5/16/86	143	ANSWERS by pltf. to deft-intervenors first set of interrogatories (resubmitted); Declaration of Lynn A. Greenwalt; * * *.
5/22/86	146	NOTICE by pltf. of filing; affidavits of Peggy Kay Peterson and Richard Loren Erman.
5/23/86	149	ORDER filed 5/22/86 denying the motions for stay of the preliminary injunction.

DATE	NR	PROCEEDINGS
6/9/86	151	NOTICE by deft to take the deposition of Richard L. Erman.
6/9/86	152	NOTICE by deft to take the deposition of Lynn A. Greenwalt.
6/9/86	153	NOTICE by deft to take the deposition of Peggy K. Peterson.
6/23/86	165	MOTION by pltf. for summary judgment; * * *.
7/1/86	167	MOTION by pltf. to quash and for a protective order; * * *.
7/15/86	178	ORDER filed 7/14/86 granting pltf's motion to quash and for a protective order.
9/5/86	197	MOTION by defts-intervenors' to dismiss or alternatively for judgment on the pleadings; * * *.
9/12/86	206	MOTION by defts for summary judgment and/or for dissolution of the preliminary injunction issued 2/10/86; memorandum in opposition to pltf's motion for summary judgment and in support of deft's motion for summary judgment; * * *.
11/26/86	228	ORDER filed 11/25/86 amending this Court's Order of February 10, 1986, to add a new subparagraph (f) to paragraph 3 of that Order.
12/31/86	233	ORDER directing that the preliminary injunction entered on 12/4/85 as amended on 2/10/86 does not apply to the Geothermal Operations of California Energy Co. Inc; the Bureau of

DATE	NR	PROCEEDINGS
		Land Management shall forthwith vacate and set aside its suspension order of 4/22/86.
1/6/87	236	ORDER that the preliminary injunction entered on 12-4-85, as amended on 2/10/86 does not apply to the Geothermal operations of the Dept. of Water and Power for the City of LA; The Bureau of Land Management shall forthwith vacate and set aside its suspension order of 4-22-86.
1/6/87	237	MEMORANDUM ORDER denying LADWP's motion for declaratory and other relief regarding the Haiwee/Franklin land exchange.
6/3/87	246	ORDER (filed 6/2/87) directing that Congressman Bruce F. Vento, Chairman of the Subcommittee on National Parks and Public Lands, is substituted as pltf-intervenor in this action; * * *.
4/11/88	252	ORDER filed 4/8/88 granting motion of deft's to amend the court's order of 2/10/86, as amended by the court's order of 11/25/86; directing that subparagraph (f) of para 3 of the court's order of 2/19/86, as amended by the court's order of 11/25/86 is amended to read; (3) nothing in this order shall be construed to prohibit or affect: (f) the Secretary of Interior or his designee(s) from complying with the statutory obligations imposed on him by Sec. 3 of Pub. L. No. 99-542

DATE	NR	PROCEEDINGS
		(10/27/86), sec. 104 of Pub L. No. 99-950 (10/30/86), Sections 4(a), 4(b), 6 and 7 of Pub. L. No. 99-632 (11/7/86), Section 12(h) of Pub. L. No. 99-606 (11/6/86) and the last two unnumbered paragraphs under the heading of "Administrative Provisions" in that portion of House Joint Resolution 395, Pub. L. No. 100-202, containing the 1988 Fiscal year appropriations for the Bureau of Land Management.
4/29/88	253	CERTIFIED copy of Judgment from USCA dated 12-11-87 - Affirming Judgment of USDC.
7/29/88	274	ORDER filed 7/28/88 that plft. file any opposition to defts' supplemental memorandum in support of their motion for summary judgment by 8/1/88; pltf. to file by 8/22/88 supplemental memorandum regarding the issue of its standing to proceed; defts. and intervenors opposition to be filed by 9/1/88; pltf's. response to be filed by 9/14/88.
8/22/88	278	STATEMENT by pltf. of P&A's in support of its standing to proceed; attachment.
11/8/88	303	ORDER filed 11/4/88 vacating the court's granting of preliminary injunction; granting motion of defendant's for summary judgment; case dismissed.

DATE	NR	PROCEEDINGS
11/14/88	304	NOTICE OF APPEAL by plaintiff National Wildlife Federation from order entered 11/8/88.
12/22/88	313	NOTICE OF APPEAL by pltf-intervenor CONGRESSMAN BRUCE F. VENTO from order entered on 11/8/88;
12/6/88	322	CERTIFIED copy of Judgment from USCA dated 6/20/89 REVERSING Judgment of USDC and REMANDING case to USDC for further proceedings in accordance with the Opinion.

UNITED STATES COURT OF APPEALS  
FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

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86-5239

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NATIONAL WILDLIFE FEDERATION

v.

ROBERT F. BURFORD, ET AL., APPELLANTS

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RELEVANT DOCKET ENTRIES

DATE	FILING - PROCEEDINGS
4/24/86	Copy of notice of appeal and docket entries from Clerk, DC.
12/11/87	Opinion for the Court filed by Circuit Judge Mikva.
12/11/87	Opinion concurring in part and dissenting in part filed by Circuit Judge Williams.
12/11/87	Judgment by this Court that the judgment of the District Court appealed from in these causes is hereby affirmed, in accordance with Opinion for the court filed herein date.
4/29/88	Per Curiam order denying petitions for rehearing, with memorandum attached.

UNITED STATES COURT OF APPEALS  
FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

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88-5397

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NATIONAL WILDLIFE FEDERATION

v.

ROBERT F. BURFORD, ET AL., APPELLANTS

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RELEVANT DOCKET ENTRIES

DATE	FILING - PROCEEDINGS
12/02/88	Copy of notice of appeal and docket entries from Clerk, Dist. Ct.
6/20/89	Opinion for the Court filed by Circuit Judge Edwards.
6/20/89	Judgment by this Court that the judgment of the district court appealed from in this matter is reversed and the case is remanded, in accordance with the Opinion for the Court filed herein this date.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION,  
1412 16TH STREET, N.W.,  
WASHINGTON, D.C. 20036  
(202) 797-6800, PLAINTIFF

v.

ROBERT F. BURFORD,  
DIRECTOR, BUREAU OF LAND MANAGEMENT,  
UNITED STATES DEPARTMENT OF THE INTERIOR,  
18TH AND C STREETS, N.W.,  
WASHINGTON, D.C. 20240  
(202) 343-1100,

DONALD P. HODEL,  
SECRETARY OF THE INTERIOR,  
UNITED STATES DEPARTMENT OF THE INTERIOR  
18TH AND C STREETS, N.W.,  
WASHINGTON, D.C. 20240  
(202) 343-1100,

AND

UNITED STATES DEPARTMENT OF THE INTERIOR  
18TH AND C STREETS, N.W.,  
WASHINGTON, D.C. 20240  
(202) 343-1100, DEFENDANTS

---

[Filed Aug. 19, 1985]

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AMENDED COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF

INTRODUCTION

1. This case challenges the Department of the Interior's conduct of its "land withdrawal review program." Under that program, the defendants have revoked withdrawals involving over 170 million acres of public lands. Another 50 million acres remain to be reviewed. This suit alleges, among other things, that the defendant's land withdrawal review program unlawfully fails to require analysis of proposed withdrawal revocations in land use plans and environmental impact statements, is being conducted without regulations, fails to provide for public participation in decision-making, and fails to provide for Congressional and Presidential review of proposed withdrawal revocations.

2. This suit is brought under provisions of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*; the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701 *et seq.*; and the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

JURISDICTION

3. This Court has jurisdiction of this action under 28 U.S.C. § 1331(a) (federal question jurisdiction) and 28 U.S.C. § 1346 (suits against agencies and officers of the United States).

4. The claims raised in this suit arise under provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 *et seq.*; the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 *et seq.*; and the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq.* The relief sought is authorized by 28 U.S.C. § 2201 (declaratory judgments) and 28 U.S.C. § 2202 (injunctive relief). Venue is proper in this Court under 28 U.S.C.

§ 1391(e). There is a present and actual controversy between the parties to this action.

#### **PARTIES**

5. Plaintiff National Wildlife Federation (NWF) has over 4.5 million members and supporters and is the nation's largest non-profit private conservation organization. Incorporated under the laws of the District of Columbia in 1939, NWF is dedicated to the wise use and management of the nation's natural resources. NWF has affiliate organizations and individual members in each of the 50 states and the District of Columbia.

6. NWF and its members are suffering and will continue to suffer injury in fact as a result of the challenged actions. Members of NWF use and enjoy the environmental resources that will be adversely affected by the challenged actions. They regularly use these resources for fishing, hunting, bird and wildlife watching, canoeing and boating, hiking, camping, and other similar activities. These persons' use and enjoyment of these resources will be irreparably injured if the defendants are permitted to terminate protective land use restrictions and thereby open up public lands to exploration, development, and disposal, without the development of land use plans, without prior preparation of adequate environmental impact statements, and without compliance with applicable laws, regulations, and procedures. Among other things, the challenged actions will adversely affect plaintiff and its members by destroying fish and wildlife habitat, and by impairing natural beauty. Further, NWF and its members suffer injury in that they have been and continue to be denied information on the potential impacts of, and alternatives to, defendants' actions and have been denied the opportunity to participate in defendants' decision-making. Further NWF and its members have

suffered injury by reason of their elected representatives, including the President of the United States and members of Congress, having been denied the opportunity and responsibility to participate in defendants' decision-making.

7. Plaintiff and its members are within the zone of interests sought to be protected by the Federal Land Policy and Management Act, the National Environmental Policy Act, and the Administrative Procedure Act.

8. Defendant, Donald P. Hodel is the Secretary of defendant United States Department of the Interior and is charged by law and regulations with the responsibility of administering and enforcing the Federal Land Policy and Management Act and complying with the provisions of the National Environmental Policy Act and the Administrative Procedure Act. He is sued in his official capacity.

9. Defendant Robert F. Burford is the Director of the Bureau of Land Management. Defendant Burford is charged by law and regulations with the responsibility for managing the public lands in compliance with the Federal Land Policy and Management Act, the National Environmental Policy Act, and the Administrative Procedure Act. He is sued in his official capacity.

10. Defendant, United States Department of the Interior, including therein the Bureau of Land Management, is a department and agency of the United States.

11. Plaintiff has made several attempts to resolve the claims raised in this Complaint. On August 14, 1984, plaintiff delivered a letter to Secretary Clark setting forth plaintiff's claims. On January 29, 1985, plaintiff delivered a letter to defendant Hodel substantially setting forth these claims again. On April 2, 1985, plaintiff delivered a letter to defendant Burford setting forth these same claims in additional detail. On April 22, 1985, representatives of the plaintiff met with defendant Burford and members of his staff to discuss these claims. Additional meetings between

representatives of both plaintiff and defendants were held on June 5, 1985, and June 19, 1985. Considerable correspondence has been exchanged between the parties. However, no resolution of this case has been achieved as a result of these efforts.

#### THE WITHDRAWAL REVIEW PROGRAM

12. Land classifications created under the now expired Classification and Multiple Use Act, 43 U.S.C. §§ 1411 *et seq.* (1964), and other federal statutes protect substantial areas of public lands from various types of commercial use and disposal. These land classifications have been included in defendants [sic] land withdrawal review program as they are "withdrawals" within the meaning of Section 103(j) of the Federal Land Management and Policy Act, 43 U.S.C. § 1702(j).

13. Similarly, other land withdrawals created by administrative action segregate areas of public land for some uses and prohibit others. These, too, have been included in defendants' land withdrawal review program as provided in Section 204(a) and (1) of FLPMA, 43 U.S.C. § 1714(a) and (1).

14. Section 701(c) of the Federal Land Policy and Management Act provides that all land withdrawals and land classifications "in effect as of the date of approval of this Act shall remain in full force and effect until modified under the provisions of this Act. . . ." 43 U.S.C. § 1701(c). Sometime after the passage of FLPMA, defendants created a Withdrawal Review Program. The purpose of this program is to review and eliminate use restrictions which limit access to public lands, including land withdrawals and land classifications.

15. Under the Withdrawal Review Program, defendants have terminated and continue to terminate land classifi-

cations affecting million [sic] acres of public lands. As of May 1985, land classifications on 152.9 million acres of public lands had been terminated by the defendants.

16. Under the Withdrawal Review Program, defendants have terminated and continue to terminate other land withdrawals affecting millions of acres of public lands. As of May 1985, defendants had terminated such land withdrawals on 20.6 million acres.

17. As of May 1985, defendants have submitted to the Office of Management and Budget recommendations for additional withdrawal revocations on public lands totalling 34 million acres. As of May 1985, approximately 15 million additional acres remain to be reviewed under the Land Withdrawal Review Program.

18. Attached to this Complaint as Exhibit A is a list of 788 land status actions, including terminations of land classifications and other land withdrawals, taken by defendants since January 1, 1981. This list is not intended to be inclusive. Upon information and belief, defendants have taken other such land status actions pursuant to the Withdrawal Review Program or other programs and continue to take such actions.

#### COUNT I

19. Pursuant to Section 202 of the Federal Land Policy and Management Act, land use plans *shall* be developed for the public lands. 43 U.S.C. § 1712. Pursuant to regulations contained at 43 C.F.R. 1600, the land use plan to be developed pursuant to the Act is a "Resource Management Plan."

20. Defendants have completed Resource Management Plans for only 9 of more than 200 identified resource areas on the public lands.

21. The land use status actions enumerated in Exhibit A were completed without prior preparation of the land use plans required by FLPMA.

22. On information and belief, other land withdrawals, including land classifications, have been terminated by defendants without prior preparation of the land use plans required by FLPMA.

23. Defendants' failure to prepare Resource Management Plans prior to commencement of the land status actions enumerated in Exhibit A, or other terminations of land withdrawals, including land classifications, is a violation of defendants' duties under Sections 102(a)(3), 202(d) and 701(c) of the Federal Land Policy and Management Act (43 U.S.C. §§ 1701(a)(3), 1712(d), 1701(c)), and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 706(2).

#### COUNT II

24. Section 204(1) of the Federal Land Policy and Management Act provides that the defendants shall review land withdrawals existing in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming, determine whether continuation of these withdrawals is appropriate, and then report these recommendations to the President and, through the President, to the Congress.

25. Defendants have completed the land status actions enumerated in Exhibit A without prior submission of a recommendation to the President or the Congress.

26. Upon information and belief, defendants have terminated land withdrawals, including land classifications, other than those listed in Exhibit A, on lands within the western states enumerated in Section 204(1), without prior submission of a recommendation to the President or the Congress.

27. Defendants' failure to submit a recommendation to the President and the Congress prior to taking the land status actions enumerated in Exhibit A or other terminations of land classifications or land withdrawals is a violation of defendants' duties under Sections 204(1) and 701(c) of the Federal Land Policy and Management Act (43 U.S.C. §§ 1714(1), 1701(c)), and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 706(2).

#### COUNT III

28. Pursuant to Section 302 of the Federal Land Policy and Management Act, defendants are required to manage the public lands according to principles of multiple use and sustained yield.

29. "Multiple use" is defined by Section 103(c) of the Federal Land Policy and Management Act (43 U.S.C. § 1702(c)) to mean:

a combination of balanced and diverse resources uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output,

including "the use of some land for less than all of the resources."

30. The Withdrawal Review Program emphasizes the availability of public lands for limited purposes, including mineral exploration and development, rather than multiple use as defined by the Act. In reliance on this program, defendants have opened millions of acres of public lands to mineral exploration and development.

31. Defendants' failure to adequately consider multiple uses of the lands reviewed under the Withdrawal Review Program constitutes a violation of defendants' duties under Sections 102(a)(7) and 302 of the Federal Land Policy and Management Act (43 U.S.C. §§ 1701(a)(7), 1732), and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 706(2).

#### COUNT IV

32. Section 102(2)(c) of the National Environmental Policy Act (NEPA) requires all federal agencies, including defendant United States Department of the Interior, to "[i]nclude in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement [commonly referred to as an environmental impact statement or EIS] by the responsible official on . . . the environmental impact of the proposed action. . . ." This provision imposes a mandatory duty upon the defendants to prepare an environmental impact statement on each individual land classification termination and land withdrawal revocation, on the cumulative effects of these actions, and on the Withdrawal Review Program itself.

33. Upon information and belief, defendants have not prepared environmental impact statements on the Withdrawal Review Program or any of its components including the land status actions enumerated in Exhibit A.

34. Defendants' failure to prepare such environmental impact statements in compliance with the Council on Environmental Quality's NEPA regulations (40 C.F.R. §§ 1500, *et seq.*) and the Department of the Interior NEPA procedures and regulations is a violation of defendants' duties under the National Environmental Policy Act, and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 706.

#### COUNT V

35. Section 310 of the Federal Land Policy and Management Act [sic] 43 U.S.C. § 1740), the Administrative Procedure Act, and the regulations adopted thereunder, require the defendants to promulgate rules and regulations implementing the land management objectives of the Federal Land Management and Policy Act.

36. Defendants have not promulgated regulations governing the revocation of withdrawals, including the termination of land classifications.

37. Defendants' failure to promulgate rules and regulations governing termination of land classifications and land withdrawals prior to taking such actions is a violation of defendants' duties under the Federal Land Policy and Management Act and the Administrative Procedure Act and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 706.

38. Alternatively, Section 553 of the Administrative Procedure Act (5 U.S.C. § 553) requires Federal agencies to promulgate regulations only after the public has been given notice and been afforded a reasonable opportunity to comment on proposed regulations.

39. No regulations regarding terminations of land withdrawals, including land classifications, undertaken pursuant to the Federal Land Management and Policy Act have been

promulgated by defendants in accordance with the notice and comment provisions of the Administrative Procedure Act.

40. Defendants have instead issued various directives, instructional memoranda, manuals, and other documents providing information and guidance to defendants' employees and agents on the manner in which the land withdrawal review program should be conducted. The public was afforded no opportunity for comment on these documents.

41. Defendants' issuance of various documents constituting *de facto* regulations regarding land classification and land withdrawal terminations without public notice and opportunity for public comment is a violation of defendants' duties under the Administrative Procedure Act, and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 551, *et seq.*

#### COUNT VI

42. On information and belief, defendants' decisions to terminate land classifications and land withdrawals, including those enumerated in Exhibit A, are not justified by the administrative record and are therefore in violation of the Administrative Procedure Act, and are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 706(2).

#### COUNT VII

43. Defendants have provided no opportunity for public comment on, or other public participation or involvement in, their decisions regarding the Land Withdrawal Review Program.

44. For the land use status actions enumerated in Exhibit A, no notice of proposed action was published in the

*Federal Register* prior to the action being taken. No public comment was invited or considered.

45. Upon information and belief, defendants have terminated other withdrawals, including land classifications, without providing an opportunity for meaningful public participation. No notices of proposed action were published. No public comment was invited.

46. Defendants' failure to provide for public participation in the development of the Withdrawal Review Program, in the land use status actions enumerated in Exhibit A and other terminations of land classifications and other land withdrawals is a violation of defendants' duties under Sections 102(a)(5), 202(c)(9), 202(f), and 309(e) of the Federal Land Policy and Management Act (43 U.S.C. §§ 1701(a)(5), 1712(c)(9), 1712(f), 1739(e)) and of the Administrative Procedure Act, and the regulations promulgated thereunder, and is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law. 5 U.S.C. § 706.

#### COUNT VIII

47. On information and belief, defendants' decisions to terminate land classifications and other land withdrawals, including those enumerated in Exhibit A, were not done in compliance with applicable regulations. Among other things, defendants' actions were not determined to be in conformity with the approved Resource Management Plans as required by 43 CFR § 1610.5-3 (1984), and where no applicable Resource Management Plan had been approved, defendants' actions were not supported by conformance determinations or other required documentation pursuant to 43 CFR § 1610.8 (1984).

48. Defendants' termination of land withdrawals, including land classifications, absent compliance with applicable regulations violated the defendants' duties pursuant

to those regulations, the Federal Land Policy and Management Act, and the Administrative Procedure Act, and was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 706.

#### PRAYER FOR RELIEF

Plaintiff respectfully requests that this Court:

(a) Adjudge and declare that defendants' Land Withdrawal Review program has been conducted in violation of applicable law and regulations.

(b) Enjoin the defendants from taking any action inconsistent with any withdrawal, classification, or other designation governing the use of public lands that was in effect on January 1, 1981, until such time as the defendants evaluate such actions in land use plans and environmental impact statements, submit such proposed actions to the President and Congress for review, and otherwise fully comply with applicable law and regulations. Among other things, the defendants should be enjoined from issuing leases; approving licences, mining plans, or plans of operations; selling, exchanging or otherwise disposing of land or interests in land; or granting easements or rights-of-way.

(c) Order that defendants reinstate all land classifications and other land withdrawals which were in existence on January 1, 1981, until such time as the defendants evaluate such actions in land use plans and environmental impact statements, submit such proposed actions to the President and Congress for review, and otherwise fully comply with applicable law and regulations;

(d) Order that defendants rescind all directives, instructional memoranda, manuals, or other documents providing information or guidance on the termination of land classifications or land withdrawals until such time as they have promulgated rules and regulations in accordance with applicable law and regulations;

(e) Grant the plaintiff its costs, disbursements, and attorneys fees; and

(f) Issue such other relief as the Court deems just and proper.

Respectfully submitted,

/s/ [SIGNATURE ILLEGIBLE]

NORMAN L. DEAN, JR.

KATHLEEN C. ZIMMERMAN

National Wildlife Federation

1412 16th Street, N.W.

Washington, D.C. 20036

(202) 797-6817

Attorneys for Plaintiff

National Wildlife Federation

Dated: August 19, 1985

# CERTIFICATE OF SERVICE

I hereby certify that on August 19, 1985, I delivered a copy of the Amended Complaint for Declaratory and Injunctive Relief to Susan Cook and Pauline Milius, United States Department of Justice, 10th Street and Constitution Avenue, N.W., Washington, D.C.

/s/ By [SIGNATURE ILLEGIBLE]

NORMAN L. DEAN, JR.

National Wildlife Federation

1412 16th Street, N.W.

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(202) 797-6817

Attorney for Plaintiff

# EXHIBIT A

National Wildlife Federation v. Burford  
Land Withdrawal Review Actions Published in  
the Federal Register Since January 1, 1981 (Revised)

No.	Federal Register Citation	State	Acres Affected
1	46 Federal Register 1734 (01/07/81)	OR	60.00
2	46 Federal Register 2048 (01/08/81)	AZ	43307.09
3	46 Federal Register 2046 (01/08/81)	CA	418.18
4	46 Federal Register 2046 (01/08/81)	NV	640.00
5	46 Federal Register 2047 (01/08/81)	OR	690.00
6	46 Federal Register 2047 (01/08/81)	OR	160.00
7	46 Federal Register 2047 (01/08/81)	OR	80.00
8	46 Federal Register 6942 (01/22/81)	AZ	42.77
9	46 Federal Register 6944 (01/22/81)	ID	40.00
10	46 Federal Register 6947 (01/22/81)	MT	80.00
11	46 Federal Register 6948 (01/22/81)	OR	40.00
12	46 Federal Register 6948 (01/22/81)	OR	80.00
13	46 Federal Register 6946 (01/22/81)	OR	440.00
14	46 Federal Register 6946 (01/22/81)	OR	40.00
15	46 Federal Register 6946 (01/22/81)	OR	40.00
16	46 Federal Register 6945 (01/22/81)	OR	6.24
17	46 Federal Register 6943 (01/22/81)	OR	80.00
18	46 Federal Register 6943 (01/22/81)	OR	289.28
19	46 Federal Register 6944 (01/22/81)	WA	680.00
20	46 Federal Register 7340 (01/23/81)	CA	1040.00
21	46 Federal Register 7341 (01/23/81)	CA	80.00
22	46 Federal Register 7345 (01/23/81)	ID	840.00
23	46 Federal Register 7346 (01/23/81)	ID	80.00
24	46 Federal Register 7343 (01/23/81)	MT	320.00
25	46 Federal Register 7343 (01/23/81)	MT	40.00
26	46 Federal Register 7345 (01/23/81)	NM	1360.00
27	46 Federal Register 7341 (01/23/81)	NV	80.00
28	46 Federal Register 7339 (01/23/81)	NM	53654.00
29	46 Federal Register 7347 (01/23/81)	MT	75.00
30	46 Federal Register 7344 (01/23/81)	OR	1635.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
31	46 Federal Register 7340 (01/23/81)	OR	140.00
32	46 Federal Register 7348 (01/23/81)	OR	9398.92
33	46 Federal Register 7346 (01/23/81)	OR	123.56
34	46 Federal Register 7346 (01/23/81)	OR	40.00
35	46 Federal Register 7345 (01/23/81)	OR	200.00
36	46 Federal Register 7343 (01/23/81)	OR	320.00
37	46 Federal Register 7338 (01/23/81)	UT	2302.91
38	46 Federal Register 7342 (01/23/81)	OR	160.00
39	46 Federal Register 7341 (01/23/81)	OR	120.00
40	46 Federal Register 7347 (01/23/81)	OR	200.00
41	46 Federal Register 7348 (01/23/81)	UT	4273.73
42	46 Federal Register 7349 (01/23/81)	UT	142.21
43	46 Federal Register 7348 (01/23/81)	UT	34265.00
44	46 Federal Register 7347 (01/23/81)	UT	160.00
45	46 Federal Register 7342 (01/23/81)	OR	46.53
46	46 Federal Register 8520 (01/27/81)	MT	120.00
47	46 Federal Register 9585 (01/29/81)	AK	15.54
48	46 Federal Register 14016 (02/25/81)	OR	120.00
49	46 Federal Register 14016 (02/25/81)	OR	3917.39
50	46 Federal Register 14189 (02/26/81)	AZ	4943.50
51	46 Federal Register 15216 (03/04/81)	UT	242.40
52	46 Federal Register 16137 (03/11/81)	CA	7144.00
53	46 Federal Register 18793 (03/26/81)	UT	
54	46 Federal Register 21836 (04/14/81)	WY	3790.66
55	46 Federal Register 23819 (04/28/81)	WY	125.28
56	46 Federal Register 26564 (05/13/81)	WA	237.80
57	46 Federal Register 27773 (05/20/81)	NM	4456048.00
58	46 Federal Register 27651 (05/21/81)	AZ	764.28
59	46 Federal Register 27651 (05/21/81)	ID	39231.37
60	46 Federal Register 27652 (05/21/81)	NV	78328.00
61	46 Federal Register 27653 (05/21/81)	OR	24.86
62	46 Federal Register 27653 (05/21/81)	WY	17.50
63	46 Federal Register 28166 (05/26/81)	AZ	1280.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
64	46 Federal Register 28163 (05/26/81)	CO	21993.30
65	46 Federal Register 28164 (05/26/81)	AZ	32245.51
66	46 Federal Register 28164 (05/26/81)	OR	40.00
67	46 Federal Register 28165 (05/26/81)	OR	200.00
68	46 Federal Register 28165 (05/26/81)	OR	12.51
69	46 Federal Register 28165 (05/26/81)	OR	30.00
70	46 Federal Register 28165 (05/26/81)	OR	11124.03
71	46 Federal Register 28167 (05/26/81)	OR	80.00
72	46 Federal Register 28167 (05/26/81)	UT	2543.45
73	46 Federal Register 28417 (05/27/81)	UT	60.00
74	46 Federal Register 28417 (05/27/81)	UT	68.66
75	46 Federal Register 28404 (05/27/81)	CA	120.00
76	46 Federal Register 28416 (05/27/81)	UT	272.00
77	46 Federal Register 28406 (05/27/81)	MT	850.77
78	46 Federal Register 28416 (05/27/81)	UT	44.99
79	46 Federal Register 28406 (05/27/81)	MT	160.00
80	46 Federal Register 28416 (05/27/81)	UT	313080.00
81	46 Federal Register 28405 (05/27/81)	MT	40.00
82	46 Federal Register 28418 (05/27/81)	WA	4.92
83	46 Federal Register 28406 (05/27/81)	NV	4280.00
84	46 Federal Register 28414 (05/27/81)	OR	77.31
85	46 Federal Register 28415 (05/27/81)	OR	275.11
86	46 Federal Register 28410 (05/27/81)	NM	400.00
87	46 Federal Register 28415 (05/27/81)	OR	80.00
88	46 Federal Register 28411 (05/27/81)	NM	240.00
89	46 Federal Register 28414 (05/27/81)	OR	60.00
90	46 Federal Register 28409 (05/27/81)	NV	2600.00
91	46 Federal Register 28413 (05/27/81)	OR	120.00
92	46 Federal Register 28409 (05/27/81)	NV	130.00
93	46 Federal Register 28413 (05/27/81)	OR	40.00
94	46 Federal Register 28412 (05/27/81)	OR	40.00
95	46 Federal Register 28415 (05/27/81)	OR	116.12
96	46 Federal Register 28411 (05/27/81)	OR	519.69

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
97	46 Federal Register 28413 (05/27/81)	OR	360.00
98	46 Federal Register 28411 (05/27/81)	OR	160.00
99	46 Federal Register 28418 (05/27/81)	WY	605.52
100	46 Federal Register 28517 (05/27/81)	NM	920000.00
101	46 Federal Register 28417 (05/27/81)	WA	125.91
102	46 Federal Register 28517 (05/27/81)	NM	605200.00
103	46 Federal Register 28404 (05/27/81)	CO	21998.87
104	46 Federal Register 28412 (05/27/81)	OR	40.00
105	46 Federal Register 28410 (05/27/81)	NM	50.00
106	46 Federal Register 28517 (05/27/81)	NM	123115.00
107	46 Federal Register 28407 (05/27/81)	NV	160.00
108	46 Federal Register 28414 (05/27/81)	OR	40.00
109	46 Federal Register 28405 (05/27/81)	MT	40.02
110	46 Federal Register 28515 (05/27/81)	ID	1079.00
111	46 Federal Register 28406 (05/27/81)	MT	240.00
112	46 Federal Register 28408 (05/27/81)	NV	73732.00
113	46 Federal Register 28410 (05/27/81)	NM	635.54
114	46 Federal Register 28414 (05/27/81)	OR	60.00
115	46 Federal Register 28412 (05/27/81)	OR	40.00
116	46 Federal Register 28652 (05/28/81)	CA	903.93
117	46 Federal Register 28754 (05/28/81)	NM	1053000.00
118	46 Federal Register 28656 (05/28/81)	OR	160.00
119	46 Federal Register 28651 (05/28/81)	CA	673.25
120	46 Federal Register 28655 (05/28/81)	OR	240.00
121	46 Federal Register 28654 (05/28/81)	CA	1027.83
122	46 Federal Register 28655 (05/28/81)	MT	160.00
123	46 Federal Register 28652 (05/28/81)	CA	240.00
124	46 Federal Register 28652 (05/28/81)	CA	15285.00
125	46 Federal Register 28655 (05/28/81)	CA	2080.00
126	46 Federal Register 28854 (05/29/81)	CA	185.00
127	46 Federal Register 28852 (05/29/81)	CA	195.88
128	46 Federal Register 28854 (05/29/81)	CA	640.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
129	46 Federal Register 28853 (05/29/81)	CA	650.50
130	46 Federal Register 28853 (05/29/81)	CA	16.47
131	46 Federal Register 28854 (05/29/81)	CA	77.22
132	46 Federal Register 28858 (05/29/81)	OR	339.89
133	46 Federal Register 28854 (05/29/81)	CA	39.94
134	46 Federal Register 28857 (05/29/81)	OR	40.00
135	46 Federal Register 28855 (05/29/81)	CA	40.00
136	46 Federal Register 28857 (05/29/81)	OR	160.00
137	46 Federal Register 28852 (05/29/81)	CA	4132.15
138	46 Federal Register 28953 (05/29/81)	NM	9177.00
139	46 Federal Register 28851 (05/29/81)	CA	163.34
140	46 Federal Register 28855 (05/29/81)	CA	2113.42
141	46 Federal Register 28857 (05/29/81)	MT	40.00
142	46 Federal Register 28953 (05/29/81)	NM	121.00
143	46 Federal Register 29263 (06/01/81)	OR	40.62
144	46 Federal Register 29510 (06/03/81)	MT	284.28
145	46 Federal Register 29710 (06/03/81)	UT	10985.22
146	46 Federal Register 29939 (06/04/81)	ID	80.00
147	46 Federal Register 29938 (06/04/81)	OR	40.00
148	46 Federal Register 29938 (06/04/81)	OR	599.50
149	46 Federal Register 29939 (06/04/81)	WA	8.17
150	46 Federal Register 29939 (06/04/81)	WY	239.04
151	46 Federal Register 29939 (06/04/81)	WA	400.00
152	46 Federal Register 31776 (06/17/81)	NM	19627.78
153	46 Federal Register 31776 (06/17/81)	NM	96069.00
154	46 Federal Register 31776 (06/17/81)	NM	1445108.00
155	46 Federal Register 31892 (06/18/81)	AZ	20.00
156	46 Federal Register 31947 (06/18/81)	NM	5516.52
157	46 Federal Register 31947 (06/18/81)	NM	31841.69
158	46 Federal Register 31892 (06/18/81)	NM	77.70
159	46 Federal Register 31893 (06/18/81)	OR	120.00
160	46 Federal Register 31892 (06/18/81)	OR	139.81

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
161	46 Federal Register 31893 (06/18/81)	OR	40.00
162	46 Federal Register 31894 (06/18/81)	OR	60.00
163	46 Federal Register 31894 (06/18/81)	OR	236.54
164	46 Federal Register 31894 (06/18/81)	OR	240.00
165	46 Federal Register 31895 (06/18/81)	OR	1500.00
166	46 Federal Register 31947 (06/18/81)	NM	
167	46 Federal Register 31947 (06/18/81)	WY	0.40
168	46 Federal Register 35504 (07/09/81)	AZ	189657.00
169	46 Federal Register 35507 (07/09/81)	SD	80.00
170	46 Federal Register 35510 (07/09/81)	MT	240.00
171	46 Federal Register 35509 (07/09/81)	OR	40.00
172	46 Federal Register 35508 (07/09/81)	MT	156.17
173	46 Federal Register 35509 (07/09/81)	OR	160.35
174	46 Federal Register 35503 (07/09/81)	ID	100.16
175	46 Federal Register 35508 (07/09/81)	WY	3559.79
176	46 Federal Register 35504 (07/09/81)	NV	374193.00
177	46 Federal Register 35504 (07/09/81)	ID	6165.37
178	46 Federal Register 35509 (07/09/81)	MT	1577.38
179	46 Federal Register 35510 (07/09/81)	MT	240.00
180	46 Federal Register 35507 (07/09/81)	NM	213.86
181	46 Federal Register 35507 (07/09/81)	WY	11.21
182	46 Federal Register 35504 (07/09/81)	NV	
183	46 Federal Register 39480 (08/03/81)	CA	5.00
184	46 Federal Register 39683 (08/04/81)	ID	50967.00
185	46 Federal Register 42199 (08/19/81)	UT	310600.00
186	46 Federal Register 42921 (08/25/81)	MT	114.00
187	46 Federal Register 43508 (08/28/81)	NV	1220.98
188	46 Federal Register 43508 (08/28/81)	NV	1731.71
189	46 Federal Register 43886 (09/01/81)	CA	298.00
190	46 Federal Register 44983 (09/09/81)	MT	3.79
191	46 Federal Register 44983 (09/09/81)	MT	120.00
192	46 Federal Register 44984 (09/09/81)	MT	80.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
193	46 Federal Register 45137 (09/10/81)	AZ	1000.00
194	46 Federal Register 45132 (09/10/81)	AZ	217624.26
195	46 Federal Register 45131 (09/10/81)	MT	60.00
196	46 Federal Register 45131 (09/10/81)	MT	155.38
197	46 Federal Register 45611 (09/14/81)	MT	45.62
198	46 Federal Register 45819 (09/15/81)	OR	19657.53
199	46 Federal Register 46134 (09/17/81)	WY	2367.16
200	46 Federal Register 46409 (09/18/81)	WY	132000.00
201	46 Federal Register 48670 (10/02/81)	CA	664.48
202	46 Federal Register 48671 (10/02/81)	CA	40.00
203	46 Federal Register 48670 (10/02/81)	AZ	320.90
204	46 Federal Register 48670 (10/02/81)	CA	40.00
205	46 Federal Register 48667 (10/02/81)	MT	3848.69
206	46 Federal Register 48667 (10/02/81)	NM	55.25
207	46 Federal Register 48668 (10/02/81)	NM	1680.00
208	46 Federal Register 48676 (10/02/81)	ID	2393.49
209	46 Federal Register 48676 (10/02/81)	OR	131.95
210	46 Federal Register 48672 (10/02/81)	ID	1360.00
211	46 Federal Register 48674 (10/02/81)	OR	680.00
212	46 Federal Register 48667 (10/02/81)	NM	157.48
213	46 Federal Register 48675 (10/02/81)	OR	662.89
214	46 Federal Register 48668 (10/02/81)	NM	95.20
215	46 Federal Register 48666 (10/02/81)	ID	200.00
216	46 Federal Register 48672 (10/02/81)	ID	239.94
217	46 Federal Register 48673 (10/02/81)	NM	40.00
218	46 Federal Register 48673 (10/02/81)	MT	112.00
219	46 Federal Register 48669 (10/02/81)	OR	400.00
220	46 Federal Register 48674 (10/02/81)	OR	200.17
221	46 Federal Register 48669 (10/02/81)	WY	30.00
222	46 Federal Register 48675 (10/02/81)	WA	1.00
223	46 Federal Register 48669 (10/02/81)	UT	1277.62
224	46 Federal Register 48995 (10/05/81)	WY	160.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
225	46 Federal Register 49649 (10/07/81)	AZ	10521657.00
226	46 Federal Register 49868 (10/08/81)	AZ	3484.00
227	46 Federal Register 49868 (10/08/81)	AZ	4000.00
228	46 Federal Register 49868 (10/08/81)	AZ	50.00
229	46 Federal Register 49871 (10/08/81)	CA	240.00
230	46 Federal Register 49869 (10/08/81)	CA	7949.00
231	46 Federal Register 49871 (10/08/81)	CA	56.00
232	46 Federal Register 49872 (10/08/81)	MT	80.00
233	46 Federal Register 49874 (10/08/81)	OR	150.00
234	46 Federal Register 49873 (10/08/81)	OR	179.31
235	46 Federal Register 49873 (10/08/81)	OR	1080.00
236	46 Federal Register 49872 (10/08/81)	OR	759.90
237	46 Federal Register 49874 (10/08/81)	OR	1459.56
238	46 Federal Register 49873 (10/08/81)	OR	390.86
239	46 Federal Register 49875 (10/08/81)	OR	187.46
240	46 Federal Register 49872 (10/08/81)	OR	360.00
241	46 Federal Register 49875 (10/08/81)	UT	226.98
242	46 Federal Register 49876 (10/08/81)	WA	5.50
243	46 Federal Register 49875 (10/08/81)	WA	40.00
244	46 Federal Register 49876 (10/08/81)	WY	80.13
245	46 Federal Register 49877 (10/08/81)	WY	7451.38
246	46 Federal Register 49876 (10/08/81)	WY	77.51
247	46 Federal Register 50541 (10/14/81)	WY	600.00
248	46 Federal Register 50857 (10/15/81)	NV	5.00
249	46 Federal Register 51050 (10/16/81)	WY	750000.00
250	46 Federal Register 51050 (10/16/81)	WY	467902.68
251	46 Federal Register 51246 (10/19/81)	FL	1.25
252	46 Federal Register 52039 (10/23/81)	WY	12.56
253	46 Federal Register 53164 (10/28/81)	CA	40.00
254	46 Federal Register 53164 (10/28/81)	CA	3370.00
255	46 Federal Register 53162 (10/28/81)	CA	34.00
256	46 Federal Register 53164 (10/28/81)	CA	0.24

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
257	46 Federal Register 53165 (10/28/81)	CO	40.00
258	46 Federal Register 53166 (10/28/81)	CO	320.00
259	46 Federal Register 53166 (10/28/81)	NM	9.66
260	46 Federal Register 53166 (10/28/81)	OR	160.84
261	46 Federal Register 53169 (10/28/81)	OR	40.00
262	46 Federal Register 53167 (10/28/81)	OR	24028.67
263	46 Federal Register 53168 (10/28/81)	OR	493.14
264	46 Federal Register 53168 (10/28/81)	OR	49.76
265	46 Federal Register 53169 (10/28/81)	UT	132.85
266	46 Federal Register 53163 (10/28/81)	UT	27.32
267	46 Federal Register 53167 (10/28/81)	OR	290.09
268	46 Federal Register 53168 (10/28/81)	OR	80.00
269	46 Federal Register 53169 (10/28/81)	OR	40.00
270	46 Federal Register 53162 (10/28/81)	OR	321.45
271	46 Federal Register 53167 (10/28/81)	OR	400.00
272	46 Federal Register 53169 (10/28/81)	UT	15.00
273	46 Federal Register 53170 (10/28/81)	WY	133.00
274	46 Federal Register 53171 (10/28/81)	WY	240.00
275	46 Federal Register 53169 (10/28/81)	UT	15.00
276	46 Federal Register 53170 (10/28/81)	WA	155.00
277	46 Federal Register 53163 (10/28/81)	CA	40.00
278	46 Federal Register 53165 (10/28/81)	CA	
279	46 Federal Register 53417 (10/29/81)	CA	16.47
280	46 Federal Register 53526 (10/29/81)	NV	27737.45
281	46 Federal Register 54345 (11/02/81)	OR	688.87
282	46 Federal Register 54344 (11/02/81)	OR	951.10
283	46 Federal Register 54345 (11/02/81)	OR	30.00
284	46 Federal Register 54344 (11/02/81)	OR	309.00
285	46 Federal Register 54345 (11/02/81)	WA	264.06
286	46 Federal Register 55012 (11/05/81)	CO	6589352.00
287	46 Federal Register 55265 (11/09/81)	ID	80.00
288	46 Federal Register 55265 (11/09/81)	NV	84142.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
289	46 Federal Register 56507 (11/17/81)	CA	3075.00
290	46 Federal Register 56508 (11/17/81)	UT	2330737.00
291	46 Federal Register 56666 (11/18/81)	WA	40.00
292	46 Federal Register 56667 (11/18/81)	WA	1011.00
293	46 Federal Register 56937 (11/19/81)	ID	40.00
294	46 Federal Register 56787 (11/19/81)	FL	39.93
295	46 Federal Register 56786 (11/19/81)	UT	928022.00
296	46 Federal Register 57289 (11/23/81)	CO	5096.28
297	46 Federal Register 57288 (11/23/81)	CO	3188.00
298	46 Federal Register 57289 (11/23/81)	CO	85.31
299	46 Federal Register 57290 (11/23/81)	OR	60.00
300	46 Federal Register 57290 (11/23/81)	OR	79.13
301	46 Federal Register 57290 (11/23/81)	OR	160.00
302	46 Federal Register 57763 (11/25/81)	ID	280.00
303	46 Federal Register 58192 (11/30/81)	NV	30347.60
304	46 Federal Register 58188 (11/30/81)	UT	4256.47
305	46 Federal Register 58188 (11/30/81)	UT	1299724.00
306	46 Federal Register 58188 (11/30/81)	NV	4256.00
307	46 Federal Register 58491 (12/02/81)	UT	80.00
308	46 Federal Register 58745 (12/03/81)	UT	312609.00
309	46 Federal Register 59542 (12/07/81)	OR	507.68
310	46 Federal Register 59974 (12/08/81)	UT	789.27
311	46 Federal Register 60276 (12/09/81)	OR	1151.36
312	46 Federal Register 61335 (12/16/81)	NV	1719.81
313	46 Federal Register 61335 (12/16/81)	OR	1040.00
314	46 Federal Register 62553 (12/24/81)	ID	439.12
315	46 Federal Register 62450 (12/24/81)	NM	160.00
316	46 Federal Register 62451 (12/24/81)	WA	80.00
317	46 Federal Register 63397 (12/31/81)	OR	12175.62
318	47 Federal Register 21 (01/04/82)	OR	7479.62
319	47 Federal Register 769 (01/07/82)	MT	160.00
320	47 Federal Register 857 (01/07/82)	UT	3035352.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
321	47 Federal Register 4352 (01/29/82)	OR	2370.76
322	47 Federal Register 5003 (02/03/82)	MT	1537000.00
323	47 Federal Register 5003 (02/03/82)	MT	184.00
324	47 Federal Register 5416 (02/05/82)	CO	5744.79
325	47 Federal Register 5420 (02/05/82)	CA	337.00
326	47 Federal Register 5419 (02/05/82)	CA	40.00
327	47 Federal Register 5417 (02/05/82)	CA	106871.00
328	47 Federal Register 5425 (02/05/82)	CA	2.00
329	47 Federal Register 5416 (02/05/82)	CO	240.00
330	47 Federal Register 5421 (02/05/82)	CO	441.47
331	47 Federal Register 5423 (02/05/82)	ID	83.98
332	47 Federal Register 5424 (02/05/82)	MT	40.00
333	47 Federal Register 5419 (02/05/82)	MT	80.00
334	47 Federal Register 5470 (02/05/82)	MT	175922.00
335	47 Federal Register 5422 (02/05/82)	NV	72.00
336	47 Federal Register 5418 (02/05/82)	NV	39310.00
337	47 Federal Register 5424 (02/05/82)	WY	75.90
338	47 Federal Register 5422 (02/05/82)	ND	640.00
339	47 Federal Register 5421 (02/05/82)	WY	156.32
340	47 Federal Register 5471 (02/05/82)	NV	420.00
341	47 Federal Register 5423 (02/05/82)	WA	10.95
342	47 Federal Register 5422 (02/05/82)	OR	0.77
343	47 Federal Register 5419 (02/05/82)	OR	42917.83
344	47 Federal Register 5418 (02/05/82)	WY	5.00
345	47 Federal Register 5471 (02/05/82)	NV	2.50
346	47 Federal Register 5424 (02/05/82)	OR	82.91
347	47 Federal Register 5421 (02/05/82)	OR	40.00
348	47 Federal Register 6099 (02/10/82)	ID	265000.00
349	47 Federal Register 6380 (02/11/82)	MT	1320.00
350	47 Federal Register 6429 (02/12/82)	AZ	12537.23
351	47 Federal Register 6646 (02/16/82)	WA	22.39
352	47 Federal Register 6852 (02/17/82)	CA	40.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
353	47 Federal Register 6856 (02/17/82)	CA	36.20
354	47 Federal Register 6851 (02/17/82)	CO	40.00
355	47 Federal Register 7002 (02/17/82)	NV	1405.91
356	47 Federal Register 6851 (02/17/82)	NV	80.00
357	47 Federal Register 6852 (02/17/82)	MT	156.26
358	47 Federal Register 6857 (02/17/82)	NV	240.00
359	47 Federal Register 7000 (02/17/82)	ID	74400.00
360	47 Federal Register 6851 (02/17/82)	NV	10.00
361	47 Federal Register 6854 (02/17/82)	CO	7126.80
362	47 Federal Register 6850 (02/17/82)	UT	242.96
363	47 Federal Register 6856 (02/17/82)	ID	90.00
364	47 Federal Register 6855 (02/17/82)	CO	2089.90
365	47 Federal Register 6855 (02/17/82)	MT	80.00
366	47 Federal Register 6858 (02/17/82)	ID	2042.14
367	47 Federal Register 6852 (02/17/82)	CA	176.33
368	47 Federal Register 6856 (02/17/82)	OR	3681.43
369	47 Federal Register 6850 (02/17/82)	UT	40.00
370	47 Federal Register 6857 (02/17/82)	UT	39916.00
371	47 Federal Register 6849 (02/17/82)	UT	1063.00
372	47 Federal Register 6853 (02/17/82)	WY	4603.00
373	47 Federal Register 7230 (02/18/82)	WA	41.60
374	47 Federal Register 7230 (02/18/82)	CA	54.25
375	47 Federal Register 7235 (02/18/82)	WA	157.50
376	47 Federal Register 7231 (02/18/82)	CA	555.00
377	47 Federal Register 7232 (02/18/82)	WA	49.30
378	47 Federal Register 7235 (02/18/82)	CA	5822.00
379	47 Federal Register 7237 (02/18/82)	OR	520.67
380	47 Federal Register 7234 (02/18/82)	OR	1882.57
381	47 Federal Register 7238 (02/18/82)	CO	820.00
382	47 Federal Register 7236 (02/18/82)	NV	538.15
383	47 Federal Register 7237 (02/18/82)	MT	160.00
384	47 Federal Register 7234 (02/18/82)	OR	520.53

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
385	47 Federal Register 7238 (02/18/82)	CO	150.00
386	47 Federal Register 7233 (02/18/82)	MT	120.00
387	47 Federal Register 7239 (02/18/82)	MT	320.00
388	47 Federal Register 7232 (02/18/82)	OR	32.81
389	47 Federal Register 7233 (02/18/82)	WY	2680.38
390	47 Federal Register 7232 (02/18/82)	AZ	10800.00
391	47 Federal Register 7231 (02/18/82)	CA	433.05
392	47 Federal Register 7236 (02/18/82)	CO	3006.00
393	47 Federal Register 7414 (02/19/82)	CO	29972.00
394	47 Federal Register 7763 (02/22/82)	WY	5.00
395	47 Federal Register 8865 (03/02/82)	WY	1300356.00
396	47 Federal Register 9293 (03/04/82)	OR	15000.00
397	47 Federal Register 9293 (03/04/82)	OR	9841.50
398	47 Federal Register 9293 (03/04/82)	OR	62500.00
399	47 Federal Register 9839 (03/08/82)	ID	140.00
400	47 Federal Register 9838 (03/08/82)	MT	552.24
401	47 Federal Register 9841 (03/08/82)	MT	440.14
402	47 Federal Register 9838 (03/08/82)	CO	0.57
403	47 Federal Register 9840 (03/08/82)	OR	224.48
404	47 Federal Register 9840 (03/08/82)	OR	80.00
405	47 Federal Register 9840 (03/08/82)	UT	8823.00
406	47 Federal Register 9838 (03/08/82)	WA	71.00
407	47 Federal Register 9839 (03/08/82)	WY	320.80
408	47 Federal Register 9841 (03/08/82)	WA	3.00
409	47 Federal Register 10213 (03/10/82)	WY	80.00
410	47 Federal Register 10214 (03/10/82)	MT	145.00
411	47 Federal Register 10213 (03/10/82)	NM	114.96
412	47 Federal Register 10214 (03/10/82)	OR	30.20
413	47 Federal Register 10214 (03/10/82)	OR	79.95
414	47 Federal Register 10215 (03/10/82)	OR	158.44
415	47 Federal Register 10296 (03/10/82)	OR	31825.11
416	47 Federal Register 10213 (03/10/82)	WA	160.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
417	47 Federal Register 10215 (03/10/82)	CO	40.00
418	47 Federal Register 10825 (03/12/82)	AZ	640.00
419	47 Federal Register 10826 (03/12/82)	CO	520.00
420	47 Federal Register 10826 (03/12/82)	UT	1023.50
421	47 Federal Register 10825 (03/12/82)	WY	161.00
422	47 Federal Register 11282 (03/16/82)	OR	40.00
423	47 Federal Register 11662 (03/18/82)	CA	74.52
424	47 Federal Register 11667 (03/18/82)	CA	0.13
425	47 Federal Register 11668 (03/18/82)	FL	
426	47 Federal Register 11665 (03/18/82)	MT	287.35
427	47 Federal Register 11676 (03/18/82)	ND	160.00
428	47 Federal Register 11665 (03/18/82)	OR	479.90
429	47 Federal Register 11670 (03/18/82)	CO	31514.00
430	47 Federal Register 11675 (03/18/82)	UT	40.00
431	47 Federal Register 11666 (03/18/82)	OR	2717.25
432	47 Federal Register 11663 (03/18/82)	UT	8761.08
433	47 Federal Register 11669 (03/18/82)	OR	1280.00
434	47 Federal Register 11670 (03/18/82)	UT	142.21
435	47 Federal Register 11673 (03/18/82)	NV	16.00
436	47 Federal Register 11667 (03/18/82)	MT	40.00
437	47 Federal Register 11669 (03/18/82)	OR	1129.86
438	47 Federal Register 11675 (03/18/82)	OR	1.56
439	47 Federal Register 11664 (03/18/82)	MT	1834.77
440	47 Federal Register 11671 (03/18/82)	WY	15676.55
441	47 Federal Register 11667 (03/18/82)	WY	7.05
442	47 Federal Register 11674 (03/18/82)	WA	180.10
443	47 Federal Register 11664 (03/18/82)	WA	2682.02
444	47 Federal Register 11666 (03/18/82)	WA	40.00
445	47 Federal Register 11871 (03/19/82)	OR	1360.00
446	47 Federal Register 12172 (03/22/82)	MT	13817.00
447	47 Federal Register 13052 (03/26/82)	WY	6440.52
448	47 Federal Register 13418 (03/30/82)	OR	98000.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
449	47 Federal Register 14157 (04/02/82)	MT	120.00
450	47 Federal Register 14158 (04/02/82)	MT	40.00
451	47 Federal Register 16107 (04/14/82)	ID	2918.86
452	47 Federal Register 16220 (04/15/82)	UT	985692.00
453	47 Federal Register 16221 (04/15/82)	UT	809400.00
454	47 Federal Register 16222 (04/15/82)	UT	56109.00
455	47 Federal Register 16220 (04/15/82)	UT	1097888.00
456	47 Federal Register 16221 (04/15/82)	UT	579069.00
457	47 Federal Register 16220 (04/15/82)	UT	1837400.00
458	47 Federal Register 16221 (04/15/82)	UT	2929000.00
459	47 Federal Register 16627 (04/19/82)	CO	1513.00
460	47 Federal Register 16628 (04/19/82)	OR	866.88
461	47 Federal Register 16682 (04/19/82)	NV	320.00
462	47 Federal Register 16626 (04/19/82)	WY	2278.38
463	47 Federal Register 17060 (04/21/82)	OR	3845.00
464	47 Federal Register 17117 (04/21/82)	UT	1365340.00
465	47 Federal Register 17818 (04/26/82)	MT	320.00
466	47 Federal Register 18054 (04/27/82)	UT	527000.00
467	47 Federal Register 18435 (04/29/82)	UT	1948.00
468	47 Federal Register 18679 (04/30/82)	MT	3.56
469	47 Federal Register 19344 (05/05/82)	ID	135.00
470	47 Federal Register 20590 (05/13/82)	OR	40.00
471	47 Federal Register 21547 (05/19/82)	FL	39.91
472	47 Federal Register 21547 (05/19/82)	ID	7857.08
473	47 Federal Register 21546 (05/19/82)	OR	200.00
474	47 Federal Register 21797 (05/20/82)	MT	127.25
475	47 Federal Register 21796 (05/20/82)	ID	200.15
476	47 Federal Register 23935 (06/02/82)	NV	48.00
477	47 Federal Register 24133 (06/03/82)	CA	0.48
478	47 Federal Register 24455 (06/04/82)	OR	23997.13
479	47 Federal Register 24452 (06/04/82)	NV	649.00
480	47 Federal Register 24452 (06/04/82)	OR	4857.00

## EXHIBIT A - Continued

<i>No.</i>	<i>Federal Register Citation</i>	<i>State</i>	<i>Acres Affected</i>
481	47 Federal Register 25213 (06/10/82)	OR	17827.00
482	47 Federal Register 26029 (06/16/82)	MT	4875742.60
483	47 Federal Register 26129 (06/17/82)	WA	1.15
484	47 Federal Register 26131 (06/17/82)	CA	38.75
485	47 Federal Register 26130 (06/17/82)	WA	33.00
486	47 Federal Register 26130 (06/17/82)	MT	1280.00
487	47 Federal Register 26132 (06/17/82)	OR	920.00
488	47 Federal Register 26130 (06/17/82)	NV	1280.00
489	47 Federal Register 26132 (06/17/82)	UT	1314.00
490	47 Federal Register 26131 (06/17/82)	WA	623.93
491	47 Federal Register 26133 (06/17/82)	CA	40.00
492	47 Federal Register 26129 (06/17/82)	OR	92.78
493	47 Federal Register 27079 (06/23/82)	ID	92.00
494	47 Federal Register 27078 (06/23/82)	MT	783.13
495	47 Federal Register 27079 (06/23/82)	ID	160.00
496	47 Federal Register 27287 (06/24/82)	CO	40.00
497	47 Federal Register 27286 (06/24/82)	CA	937.89
498	47 Federal Register 27285 (06/24/82)	MT	0.39
499	47 Federal Register 27284 (06/24/82)	MT	120.00
500	47 Federal Register 27283 (06/24/82)	MT	70.38
501	47 Federal Register 27290 (06/24/82)	NM	320.00
502	47 Federal Register 27290 (06/24/82)	OR	7855.29
503	47 Federal Register 27285 (06/24/82)	OR	1866.89
504	47 Federal Register 27289 (06/24/82)	OR	1602.18
505	47 Federal Register 27286 (06/24/82)	UT	120.00
506	47 Federal Register 27290 (06/24/82)	WA	5160.00
507	47 Federal Register 27285 (06/24/82)	WA	484.31
508	47 Federal Register 27285 (06/24/82)	WA	128.65
509	47 Federal Register 27287 (06/24/82)	UT	4440.00
510	47 Federal Register 27287 (06/24/82)	CO	40.00
511	47 Federal Register 27623 (06/25/82)	WY	40.00
512	47 Federal Register 28382 (06/30/82)	CA	6526.80

## EXHIBIT A - Continued

<i>No.</i>	<i>Federal Register Citation</i>	<i>State</i>	<i>Acres Affected</i>
513	47 Federal Register 28382 (06/30/82)	UT	136371.21
514	47 Federal Register 28656 (07/01/82)	SD	1600.00
515	47 Federal Register 28657 (07/01/82)	SD	55.00
516	47 Federal Register 28840 (07/01/82)	UT	1645062.00
517	47 Federal Register 29553 (07/09/82)	CA	31245.00
518	47 Federal Register 29846 (07/09/82)	UT	120.00
519	47 Federal Register 30878 (07/15/82)	OR	341700.00
520	47 Federal Register 31691 (07/22/82)	CA	40.00
521	47 Federal Register 31692 (07/22/82)	MT	2.50
522	47 Federal Register 31692 (07/22/82)	ID	37.50
523	47 Federal Register 31693 (07/22/82)	MT	317.37
524	47 Federal Register 32426 (07/27/82)	ID	80.00
525	47 Federal Register 32424 (07/27/82)	MT	1685.97
526	47 Federal Register 32425 (07/27/82)	OR	4710.62
527	47 Federal Register 32424 (07/27/82)	UT	3975.98
528	47 Federal Register 32488 (07/27/82)	OR	1800000.00
529	47 Federal Register 32711 (07/29/82)	NV	82248.00
530	47 Federal Register 32712 (07/29/82)	WA	714000.00
531	47 Federal Register 32801 (07/29/82)	WY	3820255.00
532	47 Federal Register 32800 (07/29/82)	WY	3641500.00
533	47 Federal Register 33325 (08/02/82)	ID	439200.96
534	47 Federal Register 33327 (08/02/82)	NV	5.00
535	47 Federal Register 34051 (08/05/82)	OR	4135000.00
536	47 Federal Register 34051 (08/05/82)	WA	4698.00
537	47 Federal Register 35352 (08/13/82)	OR	35950.00
538	47 Federal Register 35768 (08/17/82)	NM	35.45
539	47 Federal Register 35768 (08/17/82)	UT	3988505.00
540	47 Federal Register 36023 (08/18/82)	OR	17724.00
541	47 Federal Register 36023 (08/18/82)	OR	130960.00
542	47 Federal Register 36707 (08/23/82)	ID	635692.00
543	47 Federal Register 36713 (08/23/82)	OR	19875.00
544	47 Federal Register 36714 (08/23/82)	OR	25475.98

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
545	47 Federal Register 36713 (08/23/82)	OR	3438.13
546	47 Federal Register 36712 (08/23/82)	OR	2401435.30
547	47 Federal Register 36713 (08/23/82)	OR	320.00
548	47 Federal Register 36714 (08/23/82)	OR	15809.00
549	47 Federal Register 36980 (08/24/82)	WA	5099.00
550	47 Federal Register 37703 (08/26/82)	ID	2773.86
551	47 Federal Register 37703 (08/26/82)	ID	228290.38
552	47 Federal Register 37707 (08/26/82)	OR	186290.00
553	47 Federal Register 37707 (08/26/82)	OR	31380.00
554	47 Federal Register 38428 (08/31/82)	NV	30.00
555	47 Federal Register 38995 (09/03/82)	NV	1918636.00
556	47 Federal Register 39490 (09/08/82)	CA	320.00
557	47 Federal Register 39493 (09/08/82)	MT	1036.56
558	47 Federal Register 39492 (09/08/82)	CA	10.40
559	47 Federal Register 39494 (09/08/82)	MT	2778.11
560	47 Federal Register 39494 (09/08/82)	CA	960.00
561	47 Federal Register 39492 (09/08/82)	UT	1036.30
562	47 Federal Register 39493 (09/08/82)	ID	640.00
563	47 Federal Register 39495 (09/08/82)	MT	132.03
564	47 Federal Register 39491 (09/08/82)	ID	40.00
565	47 Federal Register 39492 (09/08/82)	CA	47094.00
566	47 Federal Register 39495 (09/08/82)	ID	200.00
567	47 Federal Register 39491 (09/08/82)	ID	2.88
568	47 Federal Register 39495 (09/08/82)	AK	2969659.00
569	47 Federal Register 39682 (09/09/82)	AZ	152793.89
570	47 Federal Register 39683 (09/09/82)	MT	80.00
571	47 Federal Register 39683 (09/09/82)	WA	5262.30
572	47 Federal Register 39827 (09/10/82)	CA	39.47
573	47 Federal Register 39824 (09/10/82)	CA	61.63
574	47 Federal Register 39825 (09/10/82)	MT	400.00
575	47 Federal Register 39825 (09/10/82)	WY	3851.66
576	47 Federal Register 39827 (09/10/82)	WY	2.50

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
577	47 Federal Register 40910 (09/16/82)	NV	40.00
578	47 Federal Register 42033 (09/23/82)	MT	25301.00
579	47 Federal Register 42032 (09/23/82)	MT	32.50
580	47 Federal Register 42362 (09/27/82)	AZ	346.34
581	47 Federal Register 42741 (09/29/82)	AK	31.73
582	47 Federal Register 42741 (09/29/82)	NV	194.00
583	47 Federal Register 43202 (09/30/82)	OR	67159.57
584	47 Federal Register 43953 (10/05/82)	AK	9600.00
585	47 Federal Register 45965 (10/14/82)	CA	5261.00
586	47 Federal Register 45966 (10/14/82)	ID	160.00
587	47 Federal Register 51799 (11/17/82)	CO	200.00
588	47 Federal Register 51799 (11/17/82)	ID	428300.00
589	47 Federal Register 51947 (11/18/82)	ID	1435.51
590	47 Federal Register 52571 (11/22/82)	NV	155800.00
591	47 Federal Register 52572 (11/22/82)	NV	1979960.00
592	47 Federal Register 52572 (11/22/82)	NV	28487520.00
593	47 Federal Register 53950 (11/30/82)	NV	2648040.00
594	47 Federal Register 54171 (12/01/82)	NV	3418900.00
595	47 Federal Register 54364 (12/02/82)	NV	5635160.00
596	47 Federal Register 54365 (12/02/82)	NV	1865500.00
597	47 Federal Register 54364 (12/02/82)	NV	6234280.00
598	47 Federal Register 56403 (12/16/82)	MT	15151.00
599	47 Federal Register 56408 (12/16/82)	UT	604370.00
600	47 Federal Register 56407 (12/16/82)	UT	
601	47 Federal Register 56562 (12/17/82)	NV	3112986.00
602	47 Federal Register 56562 (12/17/82)	NV	396935.00
603	47 Federal Register 56562 (12/17/82)	NV	1340.00
604	47 Federal Register 57275 (12/23/82)	AK	24.00
605	47 Federal Register 48382 (12/30/82)	CA	32660.00
606	48 Federal Register 1828 (01/14/83)	CA	1676.35
607	48 Federal Register 4559 (02/01/83)	MT	157.18
608	48 Federal Register 6037 (02/09/83)	UT	40.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
609	48 Federal Register 6037 (02/09/83)	WY	5792.33
610	48 Federal Register 6789 (02/15/83)	NV	80.00
611	48 Federal Register 9009 (03/03/83)	CA	40.00
612	48 Federal Register 9009 (03/03/83)	AZ	3828.31
613	48 Federal Register 9007 (03/03/83)	AZ	17559.28
614	48 Federal Register 9008 (03/03/83)	ID	1547.37
615	48 Federal Register 9008 (03/03/83)	OR	1025.17
616	48 Federal Register 9008 (03/03/83)	NM	160.00
617	48 Federal Register 9262 (03/04/83)	SD	20613.20
618	48 Federal Register 9643 (03/08/83)	MT	158.24
619	48 Federal Register 9864 (03/09/83)	MT	2722.28
620	48 Federal Register 12371 (03/24/83)	AZ	72.19
621	48 Federal Register 14597 (04/05/83)	WY	560.00
622	48 Federal Register 15193 (04/07/83)	ID	1720.37
623	48 Federal Register 15191 (04/07/83)	MT	96269.00
624	48 Federal Register 16685 (04/19/83)	MT	968.78
625	48 Federal Register 16684 (04/19/83)	ID	29.94
626	48 Federal Register 16685 (04/19/83)	OR	620.00
627	48 Federal Register 17081 (04/21/83)	CA	34.75
628	48 Federal Register 17145 (04/21/83)	SD	617.12
629	48 Federal Register 19082 (04/27/83)	CO	2177.25
630	48 Federal Register 19239 (04/28/83)	WY	400.00
631	48 Federal Register 19249 (04/28/83)	WY	2.50
632	48 Federal Register 19938 (05/03/83)	ND	7914.09
633	48 Federal Register 20294 (05/05/83)	MT	40.00
634	48 Federal Register 22149 (05/17/83)	CA	790.20
635	48 Federal Register 22152 (05/17/83)	CO	27.97
636	48 Federal Register 22151 (05/17/83)	ID	120.00
637	48 Federal Register 22153 (05/17/83)	NV	5120.00
638	48 Federal Register 22151 (05/17/83)	OR	160.45
639	48 Federal Register 22150 (05/17/83)	UT	3360.00
640	48 Federal Register 22152 (05/17/83)	UT	550.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
641	48 Federal Register 22149 (05/17/83)	WY	13470.59
642	48 Federal Register 22151 (05/17/83)	WY	226.75
643	48 Federal Register 22323 (05/24/83)	CO	1066680.00
644	48 Federal Register 23225 (05/24/83)	UT	785850.04
645	48 Federal Register 22324 (05/24/83)	WY	21519.00
646	48 Federal Register 23223 (05/24/83)	NV	0.60
647	48 Federal Register 23639 (05/26/83)	MN	20471.67
648	48 Federal Register 26315 (06/07/83)	NM	63849.03
649	48 Federal Register 29693 (06/28/83)	CA	40.00
650	48 Federal Register 29693 (06/28/83)	CA	6117.88
651	48 Federal Register 29695 (06/28/83)	CA	920.00
652	48 Federal Register 29697 (06/28/83)	UT	825.00
653	48 Federal Register 29696 (06/28/83)	WA	0.20
654	48 Federal Register 29697 (06/28/83)	WY	75.00
655	48 Federal Register 29694 (06/28/83)	WY	25402.38
656	48 Federal Register 29694 (06/28/83)	CA	284.00
657	48 Federal Register 29696 (06/28/83)	CA	60.00
658	48 Federal Register 30119 (06/30/83)	CA	3247.74
659	48 Federal Register 25010 (07/03/83)	NV	16725.49
660	48 Federal Register 32826 (07/19/83)	AK	217.00
661	48 Federal Register 32827 (07/19/83)	AK	0.40
662	48 Federal Register 32828 (07/19/83)	CA	19.05
663	48 Federal Register 32824 (07/19/83)	CA	13130.40
664	48 Federal Register 32826 (07/19/83)	CA	40.00
665	48 Federal Register 32829 (07/19/83)	ID	367.40
666	48 Federal Register 32828 (07/19/83)	MT	40.00
667	48 Federal Register 32827 (07/19/83)	CO	40.00
668	48 Federal Register 32876 (07/19/83)	NV	170003.02
669	48 Federal Register 32875 (07/19/83)	NV	1609629.00
670	48 Federal Register 32830 (07/19/83)	OR	40.00
671	48 Federal Register 32829 (07/19/83)	OR	280.00
672	48 Federal Register 32829 (07/19/83)	OR	237.50

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
673	48 Federal Register 32827 (07/19/83)	UT	20.00
674	48 Federal Register 32830 (07/19/83)	OR	40.00
675	48 Federal Register 33301 (07/21/83)	CA	129027.00
676	48 Federal Register 33301 (07/21/83)	AK	3539.00
677	48 Federal Register 33295 (07/21/83)	CO	40.00
678	48 Federal Register 33297 (07/21/83)	ID	320.00
679	48 Federal Register 33296 (07/21/83)	ID	160.00
680	48 Federal Register 33296 (07/21/83)	ID	191.50
681	48 Federal Register 33297 (07/21/83)	ID	274.75
682	48 Federal Register 33298 (07/21/83)	OR	2257.00
683	48 Federal Register 33298 (07/21/83)	OR	492.06
684	48 Federal Register 33297 (07/21/83)	OR	975.00
685	48 Federal Register 33299 (07/21/83)	OR	90.36
686	48 Federal Register 33299 (07/21/83)	UT	39288.47
687	48 Federal Register 33366 (07/21/83)	WY	179.00
688	48 Federal Register 33712 (07/25/83)	AK	257.00
689	48 Federal Register 33716 (07/25/83)	AZ	23026.52
690	48 Federal Register 33717 (07/25/83)	ID	37.92
691	48 Federal Register 33716 (07/25/83)	CA	104.13
692	48 Federal Register 33712 (07/25/83)	OR	1791.93
693	48 Federal Register 33713 (07/25/83)	AK	46080.00
694	48 Federal Register 33717 (07/25/83)	CA	240.00
695	48 Federal Register 33710 (07/25/83)	CA	1117.61
696	48 Federal Register 33717 (07/25/83)	CO	240.00
697	48 Federal Register 33711 (07/25/83)	ID	260.00
698	48 Federal Register 33715 (07/25/83)	AK	484.02
699	48 Federal Register 33714 (07/25/83)	AK	1596.00
700	48 Federal Register 33711 (07/25/83)	ID	160.00
701	48 Federal Register 34268 (07/28/83)	WA	6557.22
702	48 Federal Register 34524 (07/29/83)	NV	196420.00
703	48 Federal Register 34743 (08/01/83)	ID	143235.90
704	48 Federal Register 36212 (08/09/83)	NV	585033.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
705	48 Federal Register 36213 (08/09/83)	NV	213.00
706	48 Federal Register 38240 (08/23/83)	CO	120.00
707	48 Federal Register 38239 (08/23/83)	AK	1630.00
708	48 Federal Register 38468 (08/24/83)	WY	136359.00
709	48 Federal Register 39999 (09/02/83)	CO	33.79
710	48 Federal Register 40724 (09/09/83)	NM	223580.71
711	48 Federal Register 43176 (09/22/83)	AZ	2388.00
712	48 Federal Register 43175 (09/22/83)	OR	32.99
713	48 Federal Register 43176 (09/22/83)	OR	47269.14
714	48 Federal Register 43175 (09/22/83)	OR	362.11
715	48 Federal Register 43175 (09/22/83)	OR	40.00
716	48 Federal Register 43176 (09/22/83)	WA	1898.74
717	48 Federal Register 44540 (09/29/83)	AZ	13172.00
718	48 Federal Register 44539 (09/29/83)	AZ	41.80
719	48 Federal Register 44539 (09/29/83)	AZ	1675.00
720	48 Federal Register 42741 (09/29/83)	NV	194.31
721	48 Federal Register 44938 (09/30/83)	NV	2880565.00
722	48 Federal Register 44786 (09/30/83)	UT	19801.06
723	48 Federal Register 45401 (10/05/83)	AZ	2918.64
724	48 Federal Register 45395 (10/05/83)	AK	5697148.00
725	48 Federal Register 45393 (10/05/83)	NV	20.00
726	48 Federal Register 45394 (10/05/83)	WY	108.97
727	48 Federal Register 45394 (10/05/83)	AZ	
728	48 Federal Register 45608 (10/06/83)	CO	15397.35
729	48 Federal Register 45619 (10/06/83)	CO	65.00
730	48 Federal Register 45618 (10/06/83)	CO	543.68
731	48 Federal Register 45620 (10/06/83)	CO	120.00
732	48 Federal Register 45559 (10/06/83)	WA	113.65
733	48 Federal Register 46107 (10/11/83)	MT	80.00
734	48 Federal Register 46049 (10/11/83)	OR	15814.29
735	48 Federal Register 46050 (10/11/83)	OR	11543.36
736	48 Federal Register 46105 (10/11/83)	NV	4315592.00

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
737	48 Federal Register 46049 (10/11/83)	UT	40.00
738	48 Federal Register 46627 (10/13/83)	ID	1186700.00
739	48 Federal Register 49022 (10/24/83)	ID	920.00
740	48 Federal Register 50896 (11/04/83)	CA	7439.00
741	48 Federal Register 50895 (11/04/83)	CO	641.76
742	48 Federal Register 50893 (11/04/83)	OR	5631.80
743	48 Federal Register 50894 (11/04/83)	WY	80.00
744	48 Federal Register 50894 (11/04/83)	WY	2553.29
745	48 Federal Register 50895 (11/04/83)	WA	188.09
746	48 Federal Register 53182 (11/25/83)	WY	2215.68
747	48 Federal Register 54618 (12/06/83)	CA	39718.23
748	48 Federal Register 56586 (12/22/83)	ID	279.30
749	48 Federal Register 56754 (12/23/83)	NM	280.00
750	49 Federal Register 2114 (01/18/84)	MI	9.65
751	49 Federal Register 3856 (01/31/84)	MT	7756.35
752	49 Federal Register 3859 (01/31/84)	AZ	4.53
753	49 Federal Register 3859 (01/31/84)	OR	120.00
754	49 Federal Register 3860 (01/31/84)	OR	30.53
755	49 Federal Register 3858 (01/31/84)	NV	40.24
756	49 Federal Register 3860 (01/31/84)	OR	320.00
757	49 Federal Register 3858 (01/31/84)	ID	400.00
758	49 Federal Register 3859 (01/31/84)	OR	66.00
759	49 Federal Register 4478 (02/07/84)	WY	13.30
760	49 Federal Register 4477 (02/07/84)	OR	15861.17
761	49 Federal Register 4478 (02/07/84)	OR	2997.50
762	49 Federal Register 4478 (02/07/84)	CO	40.00
763	49 Federal Register 4853 (02/08/84)	MT	280.00
764	49 Federal Register 5755 (02/15/84)	AZ	490454.00
765	49 Federal Register 5926 (02/16/84)	OR	47.30
766	49 Federal Register 5924 (02/16/84)	NM	17.50
767	49 Federal Register 5924 (02/16/84)	ID	34850.75
768	49 Federal Register 5923 (02/16/84)	MT	842.92

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
769	49 Federal Register 6907 (02/24/84)	OR	2577.24
770	49 Federal Register 7807 (03/02/84)	NV	172608.00
771	49 Federal Register 12264 (03/29/84)	AK	613.19
772	49 Federal Register 13204 (04/03/84)	ID	779365.50
773	49 Federal Register 17502 (04/24/84)	OR	1805.00
774	49 Federal Register 19904 (05/10/84)	WY	2075788.53
775	49 Federal Register 19906 (05/10/84)	ID	711835.00
776	49 Federal Register 20001 (05/11/84)	AK	499606.00
777	49 Federal Register 20497 (05/15/84)	WA	1219.29
778	49 Federal Register 26052 (05/26/84)	WA	279.46
779	49 Federal Register 26053 (05/26/84)	CA	109.06
780	49 Federal Register 23701 (06/07/84)	CA	135646.00
781	49 Federal Register 24601 (06/14/84)	ID	129189.12
782	49 Federal Register 29601 (06/23/84)	CA	281.41
783	49 Federal Register 29600 (06/23/84)	UT	38.29
784	49 Federal Register 26052 (06/26/84)	OR	911.00
785	49 Federal Register 26231 (06/27/84)	CO	40.00
786	49 Federal Register 28933 (07/17/84)	UT	
787	49 Federal Register 28932 (07/17/84)	CA	1174232.00
788	49 Federal Register 31695 (08/08/84)	AZ	6.40
789	49 Federal Register 32808 (08/16/84)	ID	561087.00
790	49 Federal Register 35773 (09/12/84)	CO	80.00
791	49 Federal Register 36571 (09/18/84)	CO	49.29
792	49 Federal Register 37182 (09/21/84)	CA	73422.00
793	49 Federal Register 37183 (09/21/84)	CA	232920.00
794	49 Federal Register 37759 (09/26/84)	MT	35.00
795	49 Federal Register 37759 (09/26/84)	ID	120.00
796	49 Federal Register 36856 (09/26/84)	AZ	62000.00
797	49 Federal Register 37760 (09/26/84)	MI	3500.00
798	49 Federal Register 38202 (09/27/84)	CA	29693.00
799	49 Federal Register 40031 (10/12/84)	CO	320.00
800	49 Federal Register 40406 (10/16/84)	MT	2750.10

## EXHIBIT A - Continued

No.	Federal Register Citation	State	Acres Affected
801	49 Federal Register 40406 (10/16/84)	CA	540.00
802	49 Federal Register 40407 (10/16/84)	UT	40.00
803	49 Federal Register 42934 (10/25/84)	CA	1076.72
804	49 Federal Register 46144 (11/23/84)	WY	1533.10
805	49 Federal Register 46145 (11/23/84)	MT	120.00
806	49 Federal Register 46959 (11/29/84)	WY	10.00
807	50 Federal Register 895 (01/07/85)	CA	539586.00
808	50 Federal Register 2251 (01/17/85)	MT	99.00
809	50 Federal Register 3760 (01/28/85)	AR	0.62
810	50 Federal Register 4215 (01/30/85)	AK	288.47
811	50 Federal Register 4599 (01/31/85)	CA	520.00
812	50 Federal Register 4600 (01/31/85)	CA	48088.00
813	50 Federal Register 4599 (01/31/85)	CA	264377.00
814	50 Federal Register 5262 (02/07/85)	ID	40.00
* * * Total * * *			169236048.16

# BLM WITHDRAWAL REVIEW PROGRAM

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A Report of Progress to the  
National Public Lands Advisory Council  
Klamath Falls, Oregon  
May 1985

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U.S. Department of the Interior  
Bureau of Land Management

**Status Report  
Withdrawal Review**

The figures below show the amount of acreage reported to the National Public Lands Advisory Council on March 21, 1985, and the updated acreage figures as of April 30, 1985.

I. Withdrawn Acreage Proposed for Termination or Continuation through BLM Field Review under Section 204(l) of FLPMA (January 1981-April 1985).

	<i>Acreage Proposed for Opening to:</i>			<i>Mineral Leasing</i>
	<i>Surface</i>	<i>Mining</i>		
3/85				
Current	31,000,000	29,042,287		4,620,299
	34,023,084	29,047,316		4,620,846

II. Acreage of Withdrawals Actually Revoked under Section 204(a), (January 1981 thru April 1985)

	<i>Acreage Opening to:</i>			<i>Mineral Leasing</i>
	<i>Surface</i>	<i>Mining</i>		
3/85				
Cur.	20,600,000	5,461,144		6,268,967
	20,699,202	5,997,706		6,286,913

III. Acreage of Classifications Actually Terminated under Section 202(d) (January 1981 thru April 1981)

	<i>Acreage Opening to:</i>			<i>Mineral Leasing</i>
	<i>Surface</i>	<i>Mining</i>		
3/85				
Cur.	528,714,951	66,161,111		687,511
	528,714,951	66,161,111		687,511

<sup>1</sup> These figures represent review of waterpower withdrawals, previously identified with USGS/MMS.  
<sup>2</sup> Includes NOAA, NPS, GSA, VA, BIA, and NASA.  
<sup>3</sup> The March 1985 report was 15,012,996 acres.

OTHER	1985	1986	1987	1988	1989	1990	TOTAL
AGENCIES:	1,129	4,633	-	-	-	-	2
TOTALS	4,805,016	2,130,722	3,337,127	1,403,377	2,203,206	999,609	14,879

AGENCY	1985	1986	1987	1988	1989	1990	TOTAL
BLM <sup>1</sup>	485,484	667,600	552,900	687,200	834,500	770,300	3,997
BR	929,591	889,209	969,908	248,146	353,111	203,816	3,593
AIR FORCE	21,587	121,015	-	-	3,768	-	146
ARMY	2,721,489	20,199	902,256	133,325	787,509	25,260	4,590
COE (civilian)	62,856	65	8,797	-	-	-	71
NAVY	102,659	1,048	-	-	-	-	103
CG	1,356	135	22	39	140	33	1
FAA	2,637	600	40	180	171	-	3
FS	424,984	360,708	689,260	334,487	219,421	-	2,028
DOE	49,979	68,560	3	-	-	-	118
DOA/ARS	5	-	213,671	-	-	-	213
STATE/IBWC	1,260	-	-	-	4,586	200	6

IV.

**WITHDRAWAL REVIEW SCHEDULES**

FY 1985 to 1990

(in acres)

V. New Withdrawal Activity (Figures include pre- and post-FLPMA totals)

<i>Agency</i>	<i>Acres Withdrawn Since January 1981</i>	<i>Acres Pending Withdrawal</i>
BLM	148,994	1,483,127 <sup>1</sup>
BR	67,036	158,301
FWS	6,282	3,245,461
DOA (FS, SCS)	1,552,823 <sup>2</sup>	141,860
DOD	6,298	7,734,193
GSA		18
NOAA		8,507
BIA		40
NPS		5,655
HUD	6	
FAA		43
DOT		1,292
DOE	8,960	2,555
DOJ	90	11
VA	158	
USGS		101
	<u>1,790,647<sup>3</sup></u>	<u>12,781,164<sup>3</sup></u>

<sup>1</sup> Includes 87,416 acre pending emergency withdrawal, Fort Union coal.

<sup>2</sup> Includes 1,537,000 acre emergency withdrawal in Bob Marshall, Wilderness, Forest Service, later revoked. (This revocation is included in total for Item III.)

<sup>3</sup> The March 1985 report was for 12,784,113 acres.

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF COLUMBIA

Civil No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF

v.

ROBERT F. BURFORD, DONALD P. HODEL, AND UNITED  
STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS

**AFFIDAVIT 1A OF FRANK EDWARDS**

1. I, Frank Edwards, Assistant Director, Land Resources, Bureau of Land Management, U.S. Department of the Interior, Washington, D.C., hereby declare under penalty of perjury that the information contained in this affidavit is true and accurate to the best of my knowledge. The documents referred to in this affidavit are under my direction and control. I have held the position of Assistant Director since October 1982 and have been employed by the Bureau of Land Management for about 29 years. Based upon my past employment with the Bureau and my current job responsibilities, I am familiar with the subject matter of this affidavit and the Bureau procedures and data relating to it.

2. In this affidavit I will discuss the FLPMA section 204(a) authority to revoke withdrawals in relation to federal land withdrawals.

**INTERIOR'S GENERAL AUTHORITY TO  
REVOKE WITHDRAWALS**

3. Before the passage of FLPMA, general land withdrawal authority, including the authority to revoke

withdrawals was vested in the President. This authority was delegated to the Secretary of the Interior by Executive Order No. 10355 of May 26, 1952, 17 F.R. 4831. (Exhibit 1). FLPMA repealed the President's general withdrawal authority and in FLPMA Congress granted to the Secretary of the Interior general authority to make, modify, extend or revoke withdrawals.

4. In 1980, the Office of the Solicitor of the Department of the Interior concluded that the withdrawal review and termination provisions of FLPMA § 204(f) were self-contained and that it was not necessary that all actions taken to end withdrawals be made subject to those provisions. (Exhibit 2). Individual proposed revocations arising in the ordinary course of business of the holding agency, that is to say the agency having administrative jurisdiction over the withdrawn lands, could be processed to completion, pursuant to the separate revocation authority of the Secretary under section 204(a). On the other hand, withdrawals that were subject to the review provisions of FLPMA § 204(f) could not be brought to an end using the Secretary's revocation authority under FLPMA § 204(a).

#### **THE STEPS TAKEN NORMALLY TO REVOKE A WITHDRAWAL UNDER FLPMA SECTION 204(a)**

5. In the past, withdrawal revocations have been initiated by one of three means: a) Departments or agencies holding withdrawals which they no longer need will file a notice of intention to relinquish the reserved lands with the Bureau of Land Management. b) Any member of the public could file a petition requesting revocation of a withdrawal. Now, any member of the public may file a petition to restore and open public lands to the mining laws in cases where the lands are withdrawn for power purposes or reclamation projects. c) In the case of Bureau of Land Management lands that have been previously

withdrawn from the operation of the public land laws and where that protection is no longer required, BLM itself can initiate a revocation proposal. The notice of relinquishment process is set forth in 43 C.F.R. Subpart 2370. The regulations are supplemented by further instructions found in Bureau of Land Management Manual Part 2372. (Exhibit 3).

6. With regard to relinquishments by holding agencies, they are processed in the following manner. Upon receipt of the notice, the Bureau of Land Management's State office will review its contents for regulatory compliance and determine if the information in the notice is sufficient to support the proposed return of the land to Interior's jurisdiction. The State office also will undertake a land status check, based on the federal land records maintained in that office. Additionally, the State office will take whatever steps are necessary to be assured that the official filing the notice was duly authorized and empowered to do so. When these steps have been taken, the notice and the nucleus of the case file will become part of the existing withdrawal case and forwarded to the correct district manager for further processing.

7. The district manager will analyze the sufficiency of the information contained in or accompanying the notice of intention to relinquish. The district manager will make such investigations and undertake such negotiations as are necessary to determine whether the lands have been substantially changed in character by improvements or otherwise and whether the lands are in need of decontamination or protective measures. If so, he will negotiate the terms and conditions for an acceptable agreement for decontamination or protection of the lands. If the lands or resources have been disturbed, the district manager may also negotiate the terms and conditions for an acceptable agreement for reconditioning the lands. Also, if the lands

have been substantially changed in character by improvements or otherwise, determination is made as to whether minerals in the land are suitable for disposition under the mining and mineral laws.

8. The foregoing investigations and negotiations are summarized and incorporated into a land report. Land reports are required for all realty actions. In the case of proposed withdrawal relinquishments and revocations, the land report addresses: where the lands are located, precisely what they have been withdrawn from, why revocation would be appropriate, and to what extent the lands would be opened; a description of the character of the lands; a statement regarding present and expected post revocation land actions or uses; a mineral report, if appropriate; and compliance with the National Environmental Policy Act of 1969 (NEPA). If a recommendation is made not to proceed with a proposed relinquishment and revocation, the report must contain an explanation for the recommendation. Further details as to the revocation process are set forth in Organic Act Directive No. 81-10, dated May 15, 1981. (Exhibit 4).

9. Following completion of the land report, the case file containing it and other documents assembled in processing the proposed relinquishment are returned to the State office with the district manager's recommendation. The State Director will recommend whether the withdrawn land should be returned to Interior's jurisdiction, following revocation, and will inform the holding agency of the recommendation. In some instances the Bureau will condition acceptance of the relinquishment upon the holding agency's compliance with certain specified conditions. The General Services Administration is notified of the Bureau's decision. 43 C.F.R. Part 2370.

10. If it recommends that the reserved lands be relinquished and that the withdrawal be revoked, the State of-

fice prepares a draft public land order (PLO) and a draft transmittal memorandum that will accompany the land report and the order to the Secretary. These documents are submitted to the Regional Solicitor for review. After review for legal sufficiency by the Regional Solicitor, the holding agency is notified in writing that the lands have been found suitable for restoration to their former (pre-withdrawal) status. Thereafter, the case file containing the land report and other documents are forwarded to the Director of the Bureau of Land Management here in Washington, D.C.

11. The Director reviews the submissions from the State Director to ensure compliance with program policy guidance and manual direction. If needed, adjustments are made in the draft public land order. The Solicitor's Office reviews the proposed public land order as to its suitability for the exercise of FLPMA § 204(a) revocation authority. The public land order, then, is forwarded to the Assistant Secretary for Land and Minerals Management along with the Bureau of Land Management's recommendation, transmittal memorandum. The Assistant Secretary reviews these documents, and if he concurs, the public land order revoking the withdrawal will be signed and sent on for publication in the *Federal Register*.

12. Basically, the same process is followed in the case of BLM-initiated revocations, except that since the lands are already under Interior's jurisdiction and control, it is not, of course, necessary to follow all of the relinquishment procedures.

13. Petitions for withdrawal revocations are no longer serialized by the Bureau and treated in accordance with the procedures outlined in the Bureau of Land Management's Manual Part 2371. Instead, such requests are treated as an indication of interest in public land management and land use planning. Therefore, they are referred to the ap-

propriate field office for consideration as public input into the land use planning process under FLPMA § 202. In this regard, reference may be made to Instruction Memorandum No. 78-233 dated May 1, 1978 (Exhibit 5).

14. The Solicitor's review mentioned above in paragraph 11 was initiated during January of 1983. (Exhibit 6). In brief, a case file will be processed as a FLPMA § 204(a) revocation, as opposed to a FLPMA § 204(f) withdrawal review case file, if: (1) a notice of intention to relinquish was filed before 1980 and there is nothing in the file presented for review to indicate that the relinquishment request was undertaken in anticipation of having to comply with the withdrawal review requirements of FLPMA § 204(f); (2) the lands included in the withdrawal that would be revoked are not located in a FLPMA § 204(f) state (i.e., Alaska or one of the eastern states); (3) the proposed withdrawal revocation pertains to either Bureau of Land Management or U.S. Forest Service lands that are not closed to mining and/or the Mineral Leasing Laws. (e.g., a stock driveway withdrawal); (4) the request to revoke has been brought about in the ordinary course of business of the holding agency (usually this occurs in order to facilitate another land transaction such as an exchange, a sale, or a state in-lieu selection, which could not proceed without revoking the withdrawal); (5) the revocation action is required by an act of Congress; (6) the revocation action is merely a formality to clear the records as to lands that before the enactment of FLPMA had been conveyed out of federal ownership, without concurrent action having been taken to properly conform the land records.

15. Prior to the development in 1978 of categorical exclusions (CEs) by the President's Council on Environmental Quality, 40 C.F.R. 1500 *et seq.*, and the Bureau's development of its CEs in 1981, the Bureau used environmental assessments (EAs) as the principal mechanism

for achieving NEPA compliance in implementing its Section 204(a) authority. As more EAs were prepared, it became clear that they were showing that the mere revocation of a withdrawal did not have a significant impact upon the quality of the human environment.

16. On December 15, 1980, the Bureau published (45 F.R. 82367) its proposed CEs and requested public comment. (Exhibit 7). Six of the proposed CEs related to proposed withdrawal revocations. Six comments were received, including one by the National Wildlife Federation dated January 12, 1981 (Exhibit 8). The Federation commented on three of the proposed CEs, opposed two (where the Secretary is fulfilling a mandatory duty and has no discretion, and where future land actions would be subject to NEPA compliance), supported one (where lands are open to mining but the land has no known mineral value), and were silent on the rest.

17. With some slight modifications, the CEs were issued in final form on January 23, 1981. 46 F.R. 7492. (Exhibit 9). The Federation made no further comment. On December 9, 1981, the Bureau proposed additional CEs and published them for public comment. 46 F.R. 60278. (Exhibit 10). On January 25, 1982, the Federation commented on the proposed CEs, but made no comment on any of the CEs relevant to this case.

#### **POST REVOCATION STATUS OF LANDS INCLUDED IN A SECTION 204(a) WITHDRAWAL REVOCATION**

18. The consequences of revoking a withdrawal vary considerably depending upon individual circumstances. In many cases there will be no change whatsoever. Basically, there are two reasons for this. The lands may be subject to another withdrawal of comparable scope or they may be subject to classification segregations tantamount to such a withdrawal. In that case, the lands would not be opened to

the operation of the public land laws so that the removal of one of the withdrawals has no practical effect. Another reason why there may not be any change is that before the revocation occurred, the lands may have been transferred into private ownership. Consequently, the withdrawal revocation amounts to nothing more than a paper transaction with no substantive impact.

19. In the alternative, a revoked withdrawal may open the lands to the operation of the public land and mineral laws.

20. Some withdrawal revocations are made without prior knowledge as to what subsequent disposition may be made of the lands. After the lands are opened, they might be transferred out of federal ownership by sale, exchange, or some other discretionary mode of disposal, not anticipated when the withdrawal was revoked. These subsequent discretionary actions require separate and independent decisionmaking that, obviously, are divorced from the prior revocation decision. Environmental and other management concerns and public participation are taken into account in relation to the post-revocation decision-making.

21. As noted in paragraph 19, the opening of public lands following the revocation of a withdrawal may also lead to the locating of mining claims under the Mining Law of 1872. The right to go upon the opened lands for the purpose of mineral prospecting, exploration, development, extraction and other uses reasonably incident to mining operations carries with it the requirement to undertake adequate and responsible measures to prevent unnecessary or undue degradation of the federal lands and to provide for reasonable reclamation of those lands. 43 C.F.R. Subpart 3809. Similar regulations apply to national forest reservation lands.

22. Mining operators on project areas causing a cumulative surface disturbance in excess of five acres dur-

ing any calendar year must file a plan of operations with the Bureau of Land Management for its approval. The purpose of the plan is to prevent unnecessary or undue degradation and provide for reasonable reclamation. An EA is prepared by the Bureau to identify the impacts of the proposed operations and to determine whether an EIS is required. The EA also is used to determine the adequacy of mitigating measures and reclamation procedures included in the plan to ensure the prevention of unnecessary degradation of the land. Operations are required to be conducted to prevent unnecessary or undue degradation of the lands and to comply with all pertinent federal and state laws including but not limited to air quality, water quality, solid waste treatment requirements, and the prevention of adverse impacts to threatened or endangered species and their habitat. The regulations also provide that operators shall not knowingly disturb, alter, injure, or destroy any scientifically important paleontological remains or any historical or archaeological sites, structure, building or object on the federal lands. An opportunity is afforded for investigation and salvage of cultural and paleontology values discovered after a plan of operation has been approved or where a plan is not involved.

23. Failure of the operator to either file a plan of operations or to fulfill its terms and conditions subjects the operator to being served with a Notice of Non-compliance and a possible court injunction. 43 C.F.R. 3809.3-2.

24. Operators on project areas causing a cumulative surface disturbance on five acres or less during any calendar year are required to file a Notice. The notice must identify the lands in question, describe the access routes, and steps to be taken to prevent unnecessary or undue degradation of the lands and reclamation of same. The regulations set forth detailed standards relating to environmental protection. 43 C.F.R. 3809.1-3. Operators

are also subject to the noncompliance procedures contained in 43 C.F.R. 3809.3-2.

**STATISTICAL SUMMARY OF SECTION 204(a)  
WITHDRAWAL REVOCATION**

25. Since the passage of FLPMA, 671 public land orders, revoking withdrawals covering 19,957,607 acres of public lands have been issued by Interior. Some of the revoked withdrawals overlapped other withdrawals that remain in effect, hence, the net acreage affected was 17,303,371 acres. The revocation orders were the result of: (1) the disposition of pre-FLPMA withdrawal relinquishment and revocation requests pending at the time FLPMA was enacted; (2) record clearing actions as to lands no longer in government ownership but noted on the official status record as still being withdrawn from disposal under one or more of the public land laws; (3) revocations of withdrawals specifically excluded from review under FLPMA § 204(f); and (4) revocations (not including those mentioned in (1) above) that were made pursuant to the "ordinary course of business" rule, as articulated in the 1980 legal opinion of the Department's counsel.

The aforementioned figures are broken down by states as follows:

<i>State</i>	<i>PLO's</i>	<i>Acres Withdrawals Revoked</i>
Alaska	7	5,748,365
Arizona	36	2,313,868
California	102	563,524
Colorado	39	1,213,882
Idaho	55	382,356
Montana	69	1,587,631
Nevada	28	1,028,795
New Mexico	33	379,070
Oregon	160	303,733
Utah	51	5,423,806
Washington	39	740,904
Wyoming	40	244,648
Eastern States Office	<u>12</u>	<u>27,025</u>
	671	19,957,607

26. Of the 19,957,607 acres on which withdrawals have been revoked, 15,407,495 acres were opened to the operation of one or more of the public land laws. A state-by-state breakdown, showing the various categories to which the lands were opened, is shown on the following chart.

State	Acres Open to Surface Entry Only	Acres Open to Mining Only	Acres Open to Mineral Leasing Only	Acres Open to Mining Mineral Leasing and Surface Entry Only	Acres Open to Surface Entry and Mining Only	Acres Open to Mining Mineral Leasing Only	Acres Open to Surface Entry Mineral Leasing Only
Alas.	0	0	0	5,696,508	0	0	0
Ariz.	217,624	0	13,370	34,826	256,928	0	142,209
Cal.	154,577	19,655	35	1,667	144,355	885	0
Col.	27,463	258,040	0	508,640	111,733	0	0
Id.	101,303	260,487	24	1,567	16,567	0	0
Mon.	18,951	2,617	1,537,320	155	8,656	0	0
Nev.	344,762	0	640	152	240,032	0	640
N.M.	83,588	0	0	1,720	283,835	0	0
Ore.	67,026	15,565	0	393	26,325	0	0
Ut.	289,721	8,226	1,286	648	4,072,230	0	0
Wash.	5,599	143,468	1.0	0	151,923	0	0
Wyo.	11,244	55,083	0	3,720	38,796	0	0
ESO	0	0	10	757	0	0	24,095
TOTAL	1,321,858	763,141	1,552,686*	6,250,601	5,351,380	885	166,944

\* Includes 1,537,320 acres in the Bob Marshall Wilderness Area that on January 1, 1984, was closed to mineral leasing by the Wilderness Act of 1964.

27. In addition to the total set forth in paragraph 26 (15,407,495 acres) withdrawals were revoked on an additional 4,550,112 acres that did not result in the lands remaining open to the operation of the public land laws. The reasons are:

	<i>Acreage</i>
Land selected by States for transfer to State ownership	267,748
Overlapping Withdrawals Kept the Lands Closed	2,654,236
Lands Transferred from Federal Ownership (vast majority transferred prior to revocation)	1,119,640
Record Clearing Only (Lands transferred from Federal ownership prior to the revocation and noted in PLO as "record clearing")	212,205
Other (In aid of legislation; to facilitate resurveys; disposal of excess property; to facilitate inventories of land mineral values)	296,283
<b>TOTAL</b>	<b>4,550,112</b>

28. Withdrawals effecting 15,407,495 acres (the total in paragraph 26) have been revoked since 1976 which have returned the public lands to the operation of the public land laws and an addition 4,450,112 acres (paragraph 27) which did not. Revocations thus covered a total of 19,957,607 acres.

29. Of the 15,407,495 acres that were formally withdrawn and are now open, 12,366,007 acres are open to the operation of the mining law. The following statistical

breakdown, by state, shows the acres opened, the number of mining claims filed with the Bureau, the number of claims on which Notices have been filed (disturbance by mining activities on 5 acres or less), the number of plans of operations filed (disturbance of more than 5 acres), and the number of mineral patents issued (transference of fee title to the mining claimant). Some lands on which withdrawals were revoked opened the lands to all forms of mining; other lands were already opened to some form of mining (metalliferous) and the withdrawal revocation only opened the land to nonmetalliferous mining.:

I. Lands opened to only non-metalliferous mining (already opened to metalliferous mining)	II. Lands opened to all forms of mining
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Key:

Acres Opened (A)  
Claims Filed (B)  
Notices Filed (C)  
Plans Filed (D)  
Mineral Patents (E)

State	Totals		
<i>Alaska</i>			
(A)	0	5,696,508	5,696,508
(B)	0	4	4
(C)	0	0	0
(D)	0	0	0
(E)	0	0	0
<i>Arizona</i>			
(A)	190,997	100,757	291,754
(B)	672	1,088	1,760
(C)	1	9	10
(D)	0	4	4
(E)	0	0	0

*California*

(A)	33,472	132,610	167,424
(B)	10	822	832
(C)	2	3	5
(D)	0	13	13
(E)	0	0	0

*Colorado*

(A)	258,640	619,813	878,453
(B)	0	865	865
(C)	0	1	1
(D)	0	0	0
(E)	0	0	0

*Idaho*

(A)	263,296	15,325	278,831
(B)	11	2	13
(C)	0	0	0
(D)	2	0	2
(E)	0	0	0

*Montana*

(A)	7,600	3,828	11,428
(B)	0	11	11
(C)	0	0	0
(D)	0	0	0
(E)	0	0	0

*Nevada*

(A)	141,525	98,659	240,184
(B)	726	134	860
(C)	4	3	7
(D)	0	0	0
(E)	0	0	0

*New Mexico*

(A)	225,527	60,028	285,555
(B)	688	0	688
(C)	1	0	1
(D)	6	0	6
(E)	0	0	0

*Oregon**Washington*

(A)	151,314	186,359	337,673
(B)	5	34	39
(C)	0	14	14
(D)	0	0	0
(E)	0	0	0

*Utah*

(A)	3,990,059	91,334	4,081,393
(B)	301	195	496
(C)	1	0	1
(D)	0	0	0
(E)	0	0	0

*Wyoming*

(A)	68,656	28,943	97,599
(B)	76	0	76
(C)	2	0	2
(D)	0	0	0
(E)	0	0	0

*Eastern States*

(A)	0	757	757
(B)	0	0	0
(C)	0	0	0
(D)	0	0	0
(E)	0	0	0

*Totals:*

(A)	5,331,086	7,034,921	12,366,007
(B)	2,489	3,155	5,644
(C)	11	30	41
(D)	8	17	25
(E)	0	0	0

30. Of the 2,489 claims filed (and the resultant 11 Notices and 8 Plans of Operations) on lands opened only to non-metalliferous mining as a result of the withdrawal revocation, it cannot be determined how many relate only to non-metalliferous claims. The Bureau's mining claim recordation system does not distinguish between non-metalliferous and metalliferous claims. Thus, the actual number of claims, notices, and plans of operations filed on lands opened following the revocations in issue is less than shown in the chart in paragraph 29. We would estimate that approximately 70 to 80 percent of the claims were filed for metalliferous minerals and, thus, were in no way affected by the revocations in issue in this litigation.

31. An analysis of these figures shows that lands opened for the first time to all forms of mining total 7,034,921 acres, or approximately 3% of the total public lands.

32. With regard to the mining claims set forth in paragraph 29, the majority were located in 1983. A bureau-wide and state-by-state breakdown on the mining claims is attached as Exhibit 11. The acreage figures in Exhibit 13 do not necessarily coincide with the acreage figures given in paragraph 29 because the figures in paragraph 29 relate to the total acres opened to the mining laws while the acreage figures in Exhibit 11 relate to the acreage in the public land orders (PLO) opened to the mining laws and only on some of which were claims filed. For example, in Nevada, paragraph 29 shows that 98,659 acres

were opened to all mining with 134 resultant mining claims. Exhibit 11 shows that the 134 mining claims relate only to two PLOs that opened 15,346 acres to all forms of mining. Because of overlapping claims, it is not possible to determine the net acreage impacted by the 134 mining claims; however, Bureau experience shows the average claim is approximately 20 acres. Thus, in this example (land opened to all forms of mining in Nevada), while 98,659 acres were opened, only approximately 2,680 acres were affected by claims. Further, Exhibit 11 shows that for the last three months for which figures are available, only 45 claims have been filed: March 1985—15 claims filed; April 1985—29 claims filed; May 1985—1 claim filed.

33. In summary, the acres affected by or opened to the mining law area as follows:

Acres opened to all or some form of mining	12,366,007
Total mining claims filed	5,644
Actual acreage affected (each claim covering an average of 20 acres; overlapped acreage not calculated)	112,880
41 Notices filed on 5 acres or less (assuming maximum acres possible)	205
25 Plans of Operations (averaging 20 acres)	500

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on this 18th day of August, 1985

/s/ FRANK A. EDWARDS

Frank Edwards  
Assistant Director, Land Resources  
Bureau of Land Management

# Exhibits to the I A Edwards Affidavit

STATE: Bureau - I - 204(a) - Open to Nonmetalliferous Mineral Entry only

Action Number	Area opened	Claims located after opening	Operating Under 43 CFR 3609 Notices	Plans	Date of opening order	Number of claims located by year				
						80	81	82	83	1985
AK	0	0	0	0						
AZ	190,957	672	1	0			6	386	99	168
CA	2,538	10	2	0				1	2	7
CO	0	0	0	0						
ES	0	0	0	0						
ID	262,687	11	0	2			9		1	1
MT	0	0	0	0						
NV	140,307	726	4	0				236	320	21
NM	223,581	688	1	6					51	439
OR	1,603	5	0	0					5	
UT	3,988,545	301	1	0			57	39	210	5
WY	18,044	76	2	0					19	
Total	4,828,262	2,489	11	8			72	662	707	641
								287	81	3
									20	16

Claims are located for all forms of commodities under the mining laws.

Claims are located for all forms of commodities under the mining laws.

Action Number	Area opened	Claims located after opening	Operating Under 43 CFR 3609 Notices	Plans	Date of opening order	Number of claims located by year				
						80	81	82	83	1985
AK	0	0	0	0						
AZ	190,957	672	1	0						
CA	2,538	10	2	0						
CO	0	0	0	0						
ES	0	0	0	0						
ID	262,687	11	0	2						
MT	0	0	0	0						
NV	140,307	726	4	0						
NM	223,581	688	1	6						
OR	1,603	5	0	0						
UT	3,988,545	301	1	0						
WY	18,044	76	2	0						
Total	4,828,262	2,489	11	8						

STATE: Bureau - I - 204(a) - Open to All Mineral Entry

Action Number	Area opened	Claims located after opening	Operating Under 43 CFR 3609 Notices	Plans	Date of opening order	Number of claims located by year				
						80	81	82	83	1985
AK	0	0	0	0						
AZ	190,957	672	1	0						
CA	2,538	10	2	0						
CO	0	0	0	0						
ES	0	0	0	0						
ID	262,687	11	0	2						
MT	0	0	0	0						
NV	140,307	726	4	0						
NM	223,581	688	1	6						
OR	1,603	5	0	0						
UT	3,988,545	301	1	0						
WY	18,044	76	2	0						
Total	4,828,262	2,489	11	8						

STATE: Alaska - Land Opened under 204(a) of FLPMA  
 I Opened only to Nonmetalliferous Mineral Entry, (already open to metalliferous mineral entry).

II. Opened to All Mineral Entry.

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3809 Notices	Date of opening order	Number of claims located by year					
					1985	1	2	3	4	5
I	None									
II	6477	5,696,508	4	0	0	11/9/83		1	3	

Claims are located for all forms of commodities under the mining laws.

STATE: Arizona - Land Opened under 204(a) of FLPMA  
 I. Opened only to Nonmetalliferous Mineral Entry, (already open to metalliferous mineral entry)  
 II. Opened to All Mineral Entry.

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3809 Notices	Plans	Date of opening order	Number of claims located by year				
						1985	1	2	3	4
I	6156 5976 6281	1,300 189,657	3	0	0	3 16 82 8 05 81 6 16 82	1			
II	5689 5868 6442 6353	4,399 32,346 21,952 17,359	222 449 1 416	1 1 0 7	0 0 0 3	1 16 80 6 20 81 8 23 83 3 3 83	222 418 16 307	9 106 106		

Claims are located for all forms of commodities under the mining laws.

STATE: California - Land Opened under 204(a) of FLPMA  
 I. Opened only to Nonmetallic Mineral Entry, (already open to metallic mineral entry).  
 II. Opened to All Mineral Entry.

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3809 Notices	Plans	Date of opening order	Number of claims located by year											
						80	81	82	83	84	1	2	3	4	5		
I.																	
5941	2,113	3	0	0	06-23-81									3			
5050	25	4	0	0	08-02-82									4			
R 2590	280	1	0	0	07-27-82								1				
R 2591	40	1	0	0	03-25-82												
6042	80	1	2	0	11-06-81								1				
II.																	
6402	1,251	72	0	0	07-23-83								68	4			
5895	120	4	0	0	06-23-83								4				
5791	74,553	512	0	13	01-23-81								72	76			
2355	38,035	128	0	0	04-21-81		358	6					25	93			
5934	77	14	3	0	06-23-81		4						8	2			
5644	38	2	0	0	08-11-78								2				
5633	40	6	0	0	05-04-78		6										
5935	1,028	1	0	0	06-23-81								1				
R 27	9,002	4	0	0	05-31-77									4			
R 2565	1,742	1	0	0	04-21-81												
6490	2,932	38	0	0	12-02-83								1				
5932	7,421	17	0	0	06-23-81		10	1					12	10	4	4	
54928	440	1	0	0	10-30-79								4	2			
6393	40	2	0	0	07-22-83								2				
6336	39	17	0	0	10-07-82								11	6			
6446	225	1	0	0	08-23-83								1				
5930	3,814	1	0	0	06-23-81		1										8

Claims are located for all forms of commodities under the mining laws.

STATE: Colorado - Land Opened under 204(a) of FLPMA  
 I. Opened only to Nonmetallic Mineral Entry, (already open to metallic mineral entry).  
 II. Opened to All Mineral Entry.

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3809 Notices	Plans	Date of opening order	Number of claims located by year									
						80	81	82	83	84	1	2	3	4	
I.	None														
5867	21,993	607	0	0	05-15-81		936	70							
6103	5,745	72	0	0	01-28-82			77							
6168	820	6	0	0	02-08-82										
6170	29,972	25	0	0	02-10-82			21							
6194	40	2	0	0	03-02-82			1							
6235	1,343	5	0	0	04-12-82										
6387	508,640	148	1	0	05-16-83										

Claims are located for all forms of commodities under the mining laws.

STATE: Idaho -- Land Opened under 204(a) of FLPMA  
 I. Opened only to Nonmetallic Mineral Entry, (already open to metallic mineral entry).  
 II. Opened to All Mineral Entry.

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3009 Notices	Date of opening order	Number of claims located by year				
					1980	81	82	83	84
I.	5680	262,687	11	10-05-79	9	1	1	1	1
II.	6150	2,042	2	02-08-82	2	0	0	0	0

Claims are located for all forms of commodities under the mining laws.

Claims are located for all forms of commodities under the mining laws.

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3009 Notices	Plans	Date of opening order	Number of claims located by year				
						80	81	82	83	84
I.	None									
II.	5836	40	2	0	02-20-81	2				
	5986	4	2	0	10-07-81					
	6191	145	7	0	04-07-82					

STATE: Montana -- Land Opened under 204(a) of FLPMA  
 I. Opened only to Nonmetallic Mineral Entry, (already open to metallic mineral entry).  
 II. Opened to All Mineral Entry.

STATE: Nevada - Land Opened under 204(a) of FLPMA  
 I. Opened only to Nonmetallic Mineral Entry, (already open to metallic mineral entry).  
 II. Opened to All Mineral Entry.

	Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3009 Notices	Date of opening order	Number of claims located by year									
						80	81	82	83	84	1	2	3	4	5
I.	6135	80	3	0	02-05-82			3							
	6108	39,310	121	0	01-28-82				121						
	6081	84,142	998	4	11-02-81			229	199	21	149				
	5976	16,775	4	0	06-30-81			4							
II.	5980	130	19	0	05-18-81		9	2	8						
	5664	15,216	115	3	06-07-79	27	18	50		24					

Claims are located for all forms of commodities under the mining laws.

STATE: New Mexico - Land Opened under 204(a) of FLPMA  
 I. Opened only to Nonmetallic Mineral Entry, (already open to metallic mineral entry).  
 II. Opened to All Mineral Entry.

	Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3009 Notices	Plans	Date of opening order	80	81	82	83	84	0	2	3	4	5
I.	6459	223,581	688	1	6	10-07-83										
II.	None															

Claims are located for all forms of commodities under the mining laws.

STATE: Utah - Land Opened under 204(a) of FLPMA

I. Opened only to Nonmetallic Mineral Entry, (already open to metallic mineral entry).

II. Opened to All Mineral Entry.

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3809 Notices	Plans	Date of opening order	Number of claims located by year									
						80	81	82	83	84	1	2	3	4	5
I.	6313	3,988,505	300	1	0	09-05-82		39	209	5	47				
	6274	40	1	0	0	07-21-82		1							
II.	6149	39,916	17	0	0	03-16-82		10	3	4					
	5850	8,360	101	0	0	01-23-81		32	33	3	9				12
	6023	1,278	59	0	0	10-29-81				40	19				
	6032	227	18	0	0	01-06-81	18								

Claims are located for all forms of commodities under the mining laws.

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3809 Notices	Plans	Date of opening order	Number of claims located by year									
						80	81	82	83	84	1	2	3	4	5
I.	6282	1,603	5	0	0	06-16-82									
II.	5866	520	8	1	0	05-18-81									
	5804	690	17	13	0	12-29-80									
	6124	83	4	0	0	01-28-82									
	5833				0	01-15-81									
	6088	60	4	0	0	11-16-81									

Claims are located for all forms of commodities under the mining laws.

STATE: Oregon - Land Opened under 204(a) of FLPMA  
I. Opened only to Nonmetallic Mineral Entry, (already open to metallic mineral entry).  
II. Opened to All Mineral Entry.

STATE: Wyoming - Land Opened under 204(a) of FLPMA  
 I. Opened only to Nonmetalliferous Mineral Entry, (already open to metalliferous mineral entry).  
 II. Opened to All Mineral Entry.

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3809 Notices	Date of opening order	Number of claims located by year					
					80	81	82	83	84	1985
I.	5995 6220	2,367 15,677	75 1	2 0	0 0	09-04-81 03-12-82	57 1	18 1		
II.	None									

Claims are located for all forms of commodities under the mining laws.

UNITED STATES DISTRICT COURT  
 FOR THE  
 DISTRICT OF COLUMBIA

Civil No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF

v.

ROBERT F. BURFORD, DONALD P. HODEL, AND THE UNITED  
 STATES DEPARTMENT OF THE INTERIOR, DEFENDANT

AFFIDAVIT 1B OF FRANK EDWARDS

1. I, Frank Edwards, hereby declare under penalty of perjury that: I am the Assistant Director, Land Resources, of the Bureau of Land Management, U.S. Department of the Interior and have held that position since October 1982. I have been employed by the Bureau for about 29 years. I am acquainted with the facts in this case and swear and affirm that the information contained in this affidavit is true and accurate to the best of my knowledge.

2. In this affidavit I will discuss the FLPMA section 204(f) withdrawals review process in relation to federal land withdrawals.

3. To "withdraw" the public lands means to remove specific public lands from the operation or effect of one or more of the public land laws and/or to reserve them for a specific purpose. During the past century, numerous withdrawals were issued. Whether to continue, modify, or terminate these withdrawals was an unanswered question that eventually led to the enactment of section 204(f) of FLPMA.

4. By the end of 1958, review of withdrawals had been established as a matter of Interior policy. Part 603 of the Departmental Manual at 603.1.4 provided: "The Bureau of Land Management in cooperation with other agencies as well as interested bureaus of the Department, is responsible for the development of long-range plans and procedures for complete inventory of all current withdrawals and for systematic periodic review of such withdrawals." (Exhibit No. 1).

5. Procedures implementing Departmental Manual section 603.1.4 were promulgated shortly thereafter in BLM Manual, Volume V, Chapter 4.23, 7/18/62. The following steps were established for systematic review of withdrawals:

- a. identification of individual withdrawals and reservations, their recordation for control purposes, and creation of individual case files containing all available office information;
- b. assessment of withdrawals or reservations utilizing program development information secured from office records, land use analyses, holding agencies, and field examinations;
- c. review and comment by the holding agency preceded by discussions when necessary to facilitate review;
- d. completion of progress reports and action programs;
- e. cycling the review on a continuing basis as needed;
- f. continue processing of requests for revocations in accord with existing procedures; and
- g. implementation by state directors of mechanics for conducting withdrawal review. (Exhibit No. 2).

6. During the twenty years which preceded the enactment of Section 204(f) of FLPMA, the Department's

withdrawal review was only partially successful, although some progress had been made during the period beginning in 1956 up until 1961. (Exhibit No. 3).

7. On September 19, 1964, Congress established the Public Land Law Review Commission (Commission) for the purpose of studying existing laws and procedures relating to the administration of the public lands of the United States.

8. In 1970, the Commission recommended that Congress establish a statutory program by which existing withdrawals could be periodically reviewed with the objective of continuing, modifying, and/or revoking withdrawals. The Commission's recommendation was extremely important: (a) it would elevate the Bureau's withdrawal review to the level of legislation empowering the Department to implement a systematic review and (b) it gave Interior authority over outside holding agencies, who in the past, had tended not to cooperate with the Department fully in fulfilling the objectives of withdrawal review. (Exhibit No. 4).

9. The 204(f) withdrawal review of FLPMA evolved from the Commission's recommendation and was first set forth in section 404 of H.R. 13777, 94th Cong., 2d Sess., the House-passed version of FLPMA. Originally, two proposals were suggested by the framers of FLPMA to establish a withdrawal review process. The first proposal called for the creation of an independent withdrawal review commission. The second proposal was somewhat shorter, and, with a few modifications incorporated during the conference process, became section 204(f) of FLPMA.

#### IMPLEMENTATION OF FLPMA SECTION 204(f)

10. Procedures implementing section 204(f) began to be developed in 1977 when other agencies were notified about the existence of the program and their cooperation sought. Letters were sent to the Department of the Army, Department of the Navy, Department of the Air Force, the

U.S. Corps of Engineers, Department of Agriculture and the Department of Transportation. (Exhibit No. 5).

11. In September of 1977, Organic Act Directive (OAD) No. 77-69 (Exhibit No. 6), which outlined the procedures for conducting an inventory of withdrawals, was issued for comment. Section .06 of that Directive provided for the "comprehensive, detailed, orderly review" of withdrawn land which had been designated for review under section 204(f) of FLPMA. The inventory requirements included a review of master title plats (MTPs), General Services Administration real property reports, Forest Service land records, and holding agency records to determine which withdrawals would be reviewed. Section .11 describes the procedures for conducting the inventory review.

12. In January of 1978, draft regulations implementing the 204(f) process were prepared and forwarded by the Lands Division of the Bureau to the Bureau Organic Act Policy Committee for review. The draft regulations were designed to implement the stated congressional policy objectives contained in section 102 of FLPMA and to "define and describe the review and evaluation directive contained in section 204(f)." (Exhibit No. 7).

13. In February of 1978, comments were received from the Division of Legislative and Regulatory Management of the Bureau (Exhibit No. 8) recommending that regulations not be promulgated to implement section 204(f).

14. By March of 1978, OAD No. 77-69 (Par. No. 10 above) had been revised by OAD No. 78-13. (Exhibit No. 9). The revisions were minor and included: a modification of the step 4 inventory review process to give the Director of the Bureau authority to resolve disputes regarding whether a particular withdrawal should be subject to review.

15. OAD No. 79-28 (Exhibit No. 10) was issued in April of 1979. It discussed the establishment of withdrawal review priorities as well as a three-stage or phase process for conducting withdrawal reviews. Under OAD No. 79-28, priority was to be given to inventorying and reviewing all withdrawals specified in Section 204(f).

16. OAD No. 79-28 also described in detail three phases of withdrawal review:

(a) Inventory. The first phase includes the identification of withdrawals and a determination of whether the withdrawal is subject to review under section 603 of the Departmental Manual or section 204(f) of FLPMA. OAD No. 79-28 also detailed nine steps for conducting the inventory. (Exhibit No. 10 at Encl. 1-13 to 1-16).

(b) Verification/Reconciliation. This second phase provides for the notification to the field offices of the various holding agencies of the withdrawal review process and providing such agencies with inventory data. (Exhibit No. 10 at Encl. 1-17).

(c) Rejustification and Review. This third phase consists of developing schedules for review, rejustification for continuation or extending withdrawals, coordinating the review with holding agencies and preparing recommendations. The entire process is comprised of 20 steps beginning with a prejustification review by the Bureau District Office and culminating with the cases being transmitted to the Secretary's Office in Washington for review and recommendation (Exhibit No. 10. Encl. 1-24 to 1-29).

17. In April of 1979, the need for regulations implementing the 204(f) withdrawal review was again discussed. (Exhibit No. 11). The decision to issue regulations was debated at the staff level until June of 1979. At

that time, a second decision was made not to issue regulations by the Deputy Director for Lands and Resources.

18. In October of 1979, OAD No. 79-28, Change 1, was promulgated (Exhibit 12) to streamline supporting documentation requirements, e.g., OAD No. 79-28 required a mineral report to be submitted by holding agencies during the rejustification phase (See Exhibit No. 10 at Encl. 1-33). OAD No. 79-28, Change 1, still required the submission of a mineral report by holding agencies, however, if a United States Geological Survey report was available, it could be substituted in lieu thereof.

19. By January of 1980, the inventory of withdrawals was completed and a summary report prepared. (Exhibit No. 13). The report stated that an initial determination indicated that 67.9 million acres of withdrawn lands would be subject to review under section 204(f). Of the 67.9 million acres, 54.2 million were segregated from mineral location under the 1872 Mining Law and 18.9 million acres were segregated from mineral leasing under the 1920 Mineral Leasing Act. Many of these acres overlapped. The total number of withdrawals was 7,911.

20. The inventory report was transmitted to Congress on January 16, 1980, informing the respective Chairmen of the House Committee on Interior and Insular Affairs and Senate Committee on Energy and Natural Resources of the completion of the inventory. (Exhibit No. 14).

21. Withdrawal review procedures were often updated and revised (Exhibit Nos. 15, and 16), *inter alia*, streamlining the review procedures and providing details on how case files were to be transmitted from State offices to the Secretary and thereafter to the President and eventually to Congress.

22. In October of 1980, the Office of the Solicitor clarified the distinction between section 204(a) revocations and section 204(f) terminations. (Exhibit No. 17). The

opinion traced the legislative history of both sections and concluded that individual proposed revocations of withdrawals by holding agencies which arise during the "ordinary course of business" could be processed under the Secretary's revocation authority under section 204(a) of FLPMA rather than the self-contained termination provisions of 204(f).

23. In December of 1980, a revised report containing updated inventory data was transmitted to the appropriate Chairmen of the House and Senate Committees with oversight responsibility for withdrawal review (Exhibit No. 18). The new report refined the initial data to indicate 6,123 withdrawals comprising 51.9 million acres of land were subject to review under section 204(f).

24. In March of 1981, OAD 81-4 (Exhibit No. 19) was promulgated establishing withdrawal review priorities and target dates: (1) fiscal year (FY) 1981—complete field processing of all pre-FLPMA and other Federal holding agency withdrawal relinquishments (217 cases totaling 2.5 million acres) and commence systematic review of Bureau withdrawals which have high mineral potential; (2) FY 1982—complete field review and processing for all Bureau withdrawals, (1,317 withdrawals totaling 24 million acres); (3) FY 1983—implement 9-year schedule for review of other agency withdrawals. In order to meet the 1991 deadline mandated by FLPMA, the directive anticipated that 500-600 withdrawals had to be reviewed each year. To carry out this responsibility, additional funding (approximately 2.1 million dollars) was allocated and 56 new staff persons were hired to work in field offices throughout the country on withdrawal review.

25. OAD No. 81-10 was distributed to field offices in May of 1981 (Exhibit No. 20) and supplied guidance on: the use of categorical exclusions; the preparation of mineral and land reports; criteria for determining whether

a withdrawal should be revoked or continued; differentiating among types of withdrawals and their authorities for review; and the composition of revocation case files.

26. By May of 1982, Bureau procedures for withdrawal review were incorporated into and superseded by Bureau Manual, Section 2355 (Exhibit No. 21). Section 2355 of the manual incorporated OAD Nos. 79-28, Changes 1, 2, and 3, and OAD Nos. 81-4, 81-10, and 81-11. The basic criteria for reviewing withdrawals was modified by the manual. Reviewers were instructed to determine: 1) for what purpose were the lands withdrawn; 2) whether the purpose was still being served; and 3) whether the lands were suitable for return to the public domain (*e.g.*, not surplus property or contaminated).

27. In July of 1982, Federal holding agencies were contacted in an effort to encourage such agencies to complete schedules for withdrawal review before the end of the current fiscal year and to begin a systematic review of each withdrawal by early FY 1983 (Exhibit No. 22). Agencies were asked to compile a brief report regarding the status of the withdrawal review, detail problems and offer suggestions for improvement. If funding for conducting withdrawal review was a potential problem, the Department offered to assist the holding agencies to obtain additional funding.

28. In October of 1982, the General Accounting Office (GAO) released a report (Exhibit No. 23) which indicated that relatively little land was being opened to mineral entry despite the emphasis in section 204(f) of FLPMA on the review of withdrawals which closed the land to mining and mineral leasing. The report stated:

[B]y reviewing all BLM land first, including those lands already opened to mineral entry, many lands closed to mineral exploration and development and specified for review by the Congress have not yet been

reviewed. Congressional objectives could have been better met by now if BLM had allocated program resources proportionately to those States with the most withdrawn acreage needing review and the best potential for mineral development rather than on the basis [*sic*] numbers of withdrawal cases to be reviewed.

29. By January of 1983, the Office of the Solicitor began to review all withdrawal revocations and modifications to determine if actions taken by the Bureau were in conformance with the section 204(f) review requirements. (Exhibit No. 24). The Bureau was instructed to be prepared to justify all proposed revocations under the 204(a) "ordinary course of business" process by explaining in detail how the proposed action arose.

30. Instruction Memorandum (IM) No. 83-429 (Exhibit No. 25) issued in April of 1983, provided guidance on what constituted proper justification to continue a withdrawal which closed lands to mining and mineral leasing.

31. In May of 1983, procedures developed by the Bureau for transmitting 204(f) review packages to the President and Congress were approved by the Assistant Secretary. (Exhibit No. 26). In October 1983, I participated in a briefing the appropriate House and Senate Committees staffs and obtained agreement on these procedures.

32. In December of 1983, the initial package of 34 cases of 204(f) recommended withdrawal terminations were forwarded by the Bureau, through the Assistant Secretary, to the Secretary for review and recommendations. Nine more packages followed soon thereafter.

33. In March of 1984, the National Public Lands Advisory Council passed a resolution recommending that the Secretary of the Interior take the necessary action to assure that other agencies establish and maintain a firm

schedule to complete the withdrawal reviews prior to the 1991 deadline. (Exhibit 27.)

34. In May of 1984, staff from the Department's Office of Congressional and Legislative Affairs and I met with OMB to discuss and obtain agreement on the withdrawal review reports and procedures. No written record of this meeting was made.

35. In January of 1985, seven 204(f) packages were forwarded by the Secretary to the Office of Management and Budget (OMB) for review. Three other 204(f) packages were still being reviewed in the Office of the Secretary.

36. In June 1985 a note was sent to OMB from the Deputy Assistant Secretary, Land and Minerals Management, requesting that the seven 204(f) packages be returned to BLM. (Exhibit 28.)

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on this 18th day of August, 1985.

/s/ FRANK EDWARDS

Frank Edwards

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF COLUMBIA

Civil No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF

v.

ROBERT F. BURFORD, DONALD P. HODEL, AND THE UNITED  
STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS

**AFFIDAVIT IC OF FRANK EDWARDS**

1. I, Frank Edwards, hereby declare under penalty of perjury that I am the Assistant Director, Land Resources, Bureau of Land Management, U.S Department of the Interior, Washington, D.C., having served in that capacity since October, 1982. I have been employed by the Bureau of Land Management for about 29 years. Based upon my past employment with the Bureau and my current job responsibilities, I am familiar with the subject matter of this affidavit and the Bureau procedures and data relating to it. The information contained in this affidavit is true and accurate to the best of my knowledge, information and belief.

**LAND CLASSIFICATIONS - BACKGROUND**

2. Broad authority to classify public lands and to determine their suitability for disposal or retention for federal management was first granted to the Department of the Interior by the Taylor Grazing Act of 1934. When the statute was enacted, recognition was given for the first time to the need for conservation and management of size-

able portions of the remaining unappropriated public lands.

3. Subsequently, the President issued Executive Orders 6910 (1934) and 6964 (1935) which withdrew from disposition for general classification purposes virtually all of the remaining unappropriated public lands, including the grazing districts established by the Taylor Grazing Act. However, the President modified Executive Order No. 6910 to remove the grazing districts from its scope. (Executive Order No. 7274 (1936)).

4. In 1936, Congress amended section 7 of the Taylor Grazing Act to include the unappropriated public land areas in the contiguous States covered by the Executive Orders, as well as the grazing districts, and to broaden Interior's classification authority in keeping with the Executive Orders. As amended, section 7 provided that public lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry. Under the sweeping authority of Section 7, as amended, one could not dislodge the Government's title under the public land laws without first obtaining a favorable classification decision from Interior. Conversely, an unfavorable decision led to continued retention of the particular public land area involved in the classification request.

5. In 1964, Congress enacted the Classification and Multiple Use (C&MU) Act which called upon the Secretary of the Interior to review the public lands to determine which land shall be classified as suitable for disposal and which land should be retained in federal ownership. This act expired in 1970.

6. Simultaneously with the passage of the C&MU Act, Congress also established the Public Land Law Review Commission and declared that the public lands of the United States should be retained and managed or disposed

of in a manner to provide the maximum benefit for the general public. Thus, a new policy of balanced retention and disposal was introduced in relation to the management of the public lands.

7. In addition to the Taylor Grazing Act and the C&MU Act, other statutes were enacted pursuant to which Interior was required to take classification actions. The most notable of these statutes were the Public Land Sale Acts, the Small Tract Act of 1938, and the Recreation and Public Purposes Act. Only the latter statute survives today.

8. Interior, acting through the Bureau, had to review hundreds of millions of acres of public lands to make its determinations leading to classification for retention or disposal, before the C&MU Act expired in 1970 by its own terms. Bureau officials undertook immediately to develop procedures and published final rulemaking for classifications in October of 1965. Development of the regulations involved extensive public participation in which 65 public meetings were held throughout the Western States. With minor revisions in 1968 and 1970, the regulations remain essentially the same today as they were when issued in 1965.

9. As the regulations were being developed, Bureau of Land Management officials also sought to develop land use plans concurrently with the classification review. The land use planning system was underway by the time that most of the C&MU Act classifications had been ordered into effect.

10. According to a 1972 Bureau report, a total of 177,630,329 acres were classified under the C&MU Act. Lands classified for retention were typically segregated against agricultural entries and sale under the public sale acts. Less than two percent of the lands classified were segregated against mining. (Exhibit 1).

11. The fact that the Bureau was not wholly successful in making its classifications on the basis of planning recommendations was recognized by the Public Land Law Review Commission in its final report, *One-Third of the Nation's Land, A Report to the President and the Congress*, published in June of 1970. Recognizing "that BLM acted under a congressional mandate to make its classifications as soon as possible pursuant to an authority of temporary duration", the Commission said:

Despite the obvious need for careful planning, it is apparent that [the classifications] were made in a hurried manner on the basis of inadequate information.

It was found that, for various reasons of expediency, the Bureau concentrated on large scale retention with little land use planning on its part and virtually none on the part of local and state planning authorities (although coordination was effected with them). Thus, the classifications were not preceded by necessary comprehensive efforts to gather information pertinent to resource capabilities and future development probabilities or by systematic attempts to state alternative uses within the context of regional or state development goals.

Commission's report p. 53. (Exhibit 2)

12. However, as pointed out by the Commission, the classifications were not irrevocable, and they could be changed by the Bureau's new land use planning system as it became more refined. (Exhibit 2) This remedial approach is reflected in the provisions of section 202(d) of the Federal Land Policy and Management Act of 1976.

13. Moreover, in response to applications filed under 43 C.F.R. 2400, Bureau officials were free to examine tracts of land and determine whether the tracts were still

proper for retention in federal management or more suitable for use or disposal under appropriate statutory authority. Such determinations generally were made and were based on field reports and environmental studies prepared in accordance with the Bureau's manual requirements. Upon finding that particular public lands were suitable for disposal, the authorized officer would reclassify the lands for such purposes. In this manner, substantial acreages of public land eventually were transferred out of federal ownership under various disposal statutes, although initially they had been classified for retention under the C&MU Act.

#### LAND CLASSIFICATIONS UNDER FLPMA – SECTION 202(d)

14. Many of the recommendations contained in the 1970 report of the Public Land Law Review Commission were absorbed into the Federal Land Policy and Management Act (FLPMA), including the concept that the public lands should be retained in Federal ownership, unless as a result of the land use planning, it is determined that disposal will serve the national interest. Further, any classifications of public lands or any land use plan in effect when FLPMA was passed were to be reviewed in the land use planning process. Also, the Secretary was expressly authorized to modify or terminate any such classification consistent with such land use plans.

15. In 1979, the Bureau issued a first draft of what subsequently would become section 2355 of the Bureau's manual. This draft was distributed as an instruction memo in manual format (Exhibit 3) and provided that classifications may be reviewed under the existing planning process and the land use planning activity called for by § 202(a) of FLPMA. A second draft version of the Bureau's manual section 2355 was distributed in 1980. (Exhibit 4). This second version did not alter the first draft insofar as how

classifications were to be reviewed. It was on this basis that the vast majority of classifications were examined under Interior's post-FLPMA classification review.

16. In 1980 the Office of the Solicitor for the Department expressed the view that the FLPMA § 204(f) review was not intended to be applied to lands segregated as a result of C&MU Act retention classification decisions, and that Interior was to review C&MU classifications under the land use planning procedures of FLPMA. (Exhibit 5). Henceforth, all classifications were to be reviewed under the land use planning procedures of FLPMA §§ 202(a) and 202(d). OAD No. 78-49 Chg. 1, July 7, 1981 (Exhibit 6).

17. Initially, classification reviews covering over 1,400 classification notices, were to be completed before the end of FY 1992, as part of the Bureau of Land Management's planning process. OAD No. 81-4, dated March 2, 1981 (Exhibit 7). However, in June of 1981 classification review was accelerated. Four criteria were established, OAD No. 81-11, dated June 18, 1981 (Exhibit 8), for the termination of classifications having segregative effect:

a. The classification notice does not include any segregative language, e.g., it merely states "classified for retention".

b. The notice segregates against applications under laws which were repealed by FLPMA.

c. The classification notice segregates against discretionary land laws and a Management Framework Plan (MFP), Resource Management Plan (RMP), or special area plans such as the plan for the California Desert, is in place and provides an adequate basis for acting on applications which may be filed under those laws.

d. The classification notice segregates against the operation of the mining laws, but the Bureau of Land

Management has determined that the lands involved do not contain minerals of more than nominal value and there has been no serious interest expressed in mineral development. For lands containing minerals known or believed to be of more than nominal values other specially-referenced principles apply.

18. OAD 81-11 also provided that classifications not meeting the four criteria may be left intact pending the completion of the necessary management plans. Further, it states that when completed the plans "must provide the specificity needed to: (a) effect conformance determinations . . . and (b) obviate the necessity for continuing classifications made under elapsed statutes." (Emphasis in the original.) (Exhibit 8)

19. The 1972 report (Exhibit 1) identified over 177 million acres as having been classified. Of this total, the BLM has reviewed 167,781,998 acres since 1976. Of this latter figure, classifications have been terminated on 160,833,438 acres. These figures are broken down by states as follows:

<i>State</i>	<i>Classification Acres Reviewed</i>	<i>Classification Acres Terminated</i>
Alaska	32,625,000	32,625,000
Arizona	10,532,848	10,532,848
California	2,609,054	2,460,636
Colorado	6,618,096	6,611,620
Idaho	5,210,046	5,206,406
Montana	5,201,297	5,197,520
Nevada	39,882,870	39,670,798
New Mexico	8,974,939	8,900,622
Oregon	13,444,337	9,549,621
Utah	29,938,546	27,343,457
Washington	25,809	23,986
Wyoming	12,719,156 [sic]	23,710,924
Eastern States	0	0
TOTALS	167,781,998	160,833,438

20. Of the 160.8 million acres on which classifications have been terminated, 819,876 acres have been opened to the operation of the mining laws and 96,030 acres had been opened to the operation of the mineral leasing laws. On a state-by-state basis, this break down is as follows:

<i>State</i>	<i>Acres Open to Mining Location</i>	<i>Acres Open to Mineral Leasing</i>
Alaska	0	0
Arizona	109,095	36,946
California	73,810	0
Colorado	20,501	0
Idaho	17,535	0
Montana	16,097	0
Nevada	141,888	213
New Mexico	32,131	53,673
Oregon	138,507	5,198
Utah	176,685	0
Washington	3,743	357
Wyoming	89,884	4,300
Eastern States	0	0
<b>TOTALS</b>	<b>819,876</b>	<b>96,030</b>

21. With regard to lands that have been opened to the operation of the mining laws, following is a state-by-state breakdown, showing acres opened to the mining laws, the mining claims located, the number of notices filed (mining activities disturbing 5 acres or less), plans of operations (disturbing more than 5 acres) and mineral patents issued.

**Lands Opened due to  
Land Classification  
202(d) Terminations  
(for all mining)**

**Key:**

Acres Opened (A)

Claims Filed (B)

Notices Filed (C)

Plans Filed (D)

Mineral Patents (E)

<i>State</i>	<i>Totals</i>
<b>Alaska</b>	
(A) .....	0
(B) .....	0
(C) .....	0
(D) .....	0
(E) .....	0
<b>Arizona</b>	
(A) .....	109,095
(B) .....	69
(C) .....	1
(D) .....	0
(E) .....	0
<b>California</b>	
(A) .....	73,810
(B) .....	445
(C) .....	5
(D) .....	0
(E) .....	0
<b>Colorado</b>	
(A) .....	20,501
(B) .....	84
(C) .....	1
(D) .....	0
(E) .....	0

<b>Idaho</b>	
(A) .....	17,535
(B) .....	31
(C) .....	0
(D) .....	0
(E) .....	0
<b>Montana</b>	
(A) .....	16,097
(B) .....	1
(C) .....	0
(D) .....	0
(E) .....	0
<b>Nevada</b>	
(A) .....	141,888
(B) .....	149
(C) .....	9
(D) .....	1
(E) .....	0
<b>New Mexico</b>	
(A) .....	32,131
(B) .....	0
(C) .....	0
(D) .....	0
(E) .....	0
<b>Oregon</b>	
<b>Washington</b>	
(A) .....	142,250
(B) .....	34
(C) .....	4
(D) .....	0
(E) .....	0
<b>Utah</b>	
(A) .....	176,685
(B) .....	25
(C) .....	0
(D) .....	0
(E) .....	0

<b>Wyoming</b>	
(A) .....	89,884
(B) .....	406
(C) .....	3
(D) .....	1
(E) .....	0
<b>Eastern States</b>	
(A) .....	0
(B) .....	0
(C) .....	0
(D) .....	0
(E) .....	0
<b>Totals</b>	
(A) .....	819,876
(B) .....	1,244
(C) .....	23
(D) .....	2
(E) .....	0

22. Attached as Exhibit 9, is a further breakdown, state-by-state, of the timing relating to filing of mining claims from date of termination (through May 1985) and their locations. The acreage figures in Exhibit 9 do not necessarily coincide with the acreage figures given in paragraph 21 because the figures in paragraph 21 relate to the total acres opened to the mining laws while the acreage figures in Exhibit 9 relate only to the acreage in the classification notices that were opened and on some of which claims were filed. For example, in Idaho, paragraph 21 shows that 17,535 acres were opened to all forms of mining with 31 resultant mining claims. Exhibit 9 shows that the 31 mining claims relate only to two classification notices that opened 910 acres to all forms of mining. Because of overlapping claims, it is not possible to determine the net acreage impacted by the 31 mining claims; however, Bureau experience shows the average claim is ap-

proximately 20 acres. Thus, in this example, (lands opened to all forms of mining in Idaho) while 17,535 acres were opened, only approximately 620 acres were affected. Further, as can be seen, the total claims in Exhibit 9 located in 1985 have been few: January 1985—27 claims located; February 1985—12 claims located; March 1985—2 claims located; April 1985—8 claims located; and May 1985—0 claims located.

23. In summary, the total acres affected by or opened to the mining law are as follows:

Acres opened to all or some form of mining . . . .	819,876
Mining claims filed . . . . .	1,244
Actual acreage affected (each claim covering an average of 20 acres; overlapping claims are not calculated) . . . . .	24,880
23 Notices filed on 5 acres or less (assuming maximum) . . . . .	115
2 Plans of Operations (average 20 acres) . . . . .	40

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on this 18th day of August, 1981.

/s/ Frank A. Edwards  
FRANK EDWARDS

# Exhibits to the I C Edwards Affidavit

STATE: Bureau - 202545 - Open to all mineral entry

Action Number	Acres opened	Claims located after opening	Operating Under 43 CFR 1809 Notices	Plans	Date of opening order	Number of claims located by year									
						80	81	82	83	84	1	2	3	4	5
AK	0	0	0	0											
AZ	58,033	69	1	0				6	42	9	2	10	2	8	
CA	21,329	445	5	0			40	30	205	144	13	2			
CO	3,537	84	1	0					4	77	3				
ES	0	0	0	0											
ID	910	31	0	0		13	6		12	1					
MT	1,439	1	0	0											
NV	91,210	149	9	1				45	93	42	9				
NM	0	0	0	0											
OR	26,445	14	4	0			4	7	20	2					
UT	23,249	25	0	0				1	7	17					
WY	4,455	406	3	1					2	404					
Total	230,607	1,244	23	2		13	50	89	345	606	27	12	2	8	

Claims are located for all forms of commodities under the mining laws.

STATE: California -- Open to All Mineral Entry Under 202(d) of FLPMA

Action Number	Area opened	Claims located after opening	Operating Under 43 CFR 3009	Plan	Date of opening order	Number of claims located by year									
						80	81	82	83	84	1	2	3	4	5
111 R	06057	120	2	0	0	0	0	0	0	0	0	0	0	0	0
CA	2824W/R	15	4	0	0	0	0	0	0	0	0	0	0	0	0
CA	7024W/R	139	5	0	0	0	0	0	0	0	0	0	0	0	0
CA	7025W/R	25	4	0	0	0	0	0	0	0	0	0	0	0	0
CA	7756W/R	28	3	0	0	0	0	0	0	0	0	0	0	0	0
S	4207W/R	20	3	0	0	0	0	0	0	0	0	0	0	0	0
R	02354W/R	110	6	0	0	0	0	0	0	0	0	0	0	0	0
S	4885W/R	20	3	0	0	0	0	0	0	0	0	0	0	0	0
S	077039W/R	70	32	0	0	0	0	0	0	0	0	0	0	0	0
CA	7758W/R	203	7	0	0	0	0	0	0	0	0	0	0	0	0
S	2507W/R	55	2	0	0	0	0	0	0	0	0	0	0	0	0
CA	7105W/R	5	5	0	0	0	0	0	0	0	0	0	0	0	0
CA	7107W/R	1	1	0	0	0	0	0	0	0	0	0	0	0	0
CA	7114W/R	1	1	0	0	0	0	0	0	0	0	0	0	0	0
CA	7115W/R	8	2	0	0	0	0	0	0	0	0	0	0	0	0
CA	7118W/R	5	3	0	0	0	0	0	0	0	0	0	0	0	0
CA	7119W/R	82	28	0	0	0	0	0	0	0	0	0	0	0	0
CA	7120W/R	10	3	0	0	0	0	0	0	0	0	0	0	0	0
CA	7121W/R	15	1	0	0	0	0	0	0	0	0	0	0	0	0
CA	7123W/R	3	2	0	0	0	0	0	0	0	0	0	0	0	0
CA	7124W/R	626	54	2	0	0	0	0	0	0	0	0	0	0	0
CA	7131W/R	13	1	0	0	0	0	0	0	0	0	0	0	0	0
CA	7134W/R	23	1	0	0	0	0	0	0	0	0	0	0	0	0
CA	7137W/R	95	2	0	0	0	0	0	0	0	0	0	0	0	0
CA	7161W/R	125	1	0	0	0	0	0	0	0	0	0	0	0	0
CA	7164W/R	5	1	0	0	0	0	0	0	0	0	0	0	0	0
CA	7171W/R	86	1	0	0	0	0	0	0	0	0	0	0	0	0
CA	7218W/R	21	38	0	0	0	0	0	0	0	0	0	0	0	0

Claims are located for all forms of commodities under the mining laws.

Claims are located for all forms of commodities under the mining laws.

Action Number	Area opened	Claims located after opening	Operating Under 43 CFR 3009	Plan	Date of opening order	Number of claims located by year									
						80	81	82	83	84	1	2	3	4	5
110	2033	1	0	0	0	0	0	0	0	0	0	0	0	0	0
A	2153	2	0	0	0	0	0	0	0	0	0	0	0	0	0
A	3478	5	0	0	0	0	0	0	0	0	0	0	0	0	0
A	3639	4	0	0	0	0	0	0	0	0	0	0	0	0	0
A	4445	49	0	0	0	0	0	0	0	0	0	0	0	0	0
A	6369	1	0	0	0	0	0	0	0	0	0	0	0	0	0

STATE: Arizona -- Open to All Mineral Entry Under 202(d) of FLPMA

## STATE (Continued) - (Data to All General Encls) Under 2014/01/11 PM 4

[illegible]

\* Claims are located for all forms of commodities under the mining laws.

STATE: Colorado -- Open to All Mineral Entry Under 202(d) of FLPMA

Account Number	Claims opened	Claims located after opening	Operating Under 43 CFR 3809 Notices	Plans	Date of opening order	Number of claims located by year											
						80	81	82	83	84	1	2	3	4	5		
C 081299	265	18	0	0	9-28-83												
C 083416	105	7	0	0	9-28-83				4	15	3						
C 083451	260				9-28-83					3							
C 083452	544	13	0	0	9-28-83												
C 083453	1,233				9-28-83					13							
C 083472	1,000	38	0	0	9-28-83												
C 8085	130	8	1	0	5-21-81					38							
										8							

Claims are treated for all forms of commodities under the mining laws.

## STATE: Idaho - Open to All Mineral Entry Under 202(d) of FLPMA

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 1009 Notices	Date of opening order	Number of claims located by year				
					1980	81	82	83	84
111	1-1639	430	12	0	0	0	0	0	0
	1-2448	240	6	0	0	0	0	0	0
	1-2634	240	13	0	0	0	0	0	0

Claims are located for all forms of commodities under the mining laws.

## STATE: Montana - Open to All Mineral Entry Under 202(d) of FLPMA

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 1009 Notices	Plans	Date of opening order	Number of claims located by year				
						1980	81	82	83	84
111	M 1361	1,439	1	0	0	0	0	0	0	0

Claims are located for all forms of commodities under the mining laws.

STATE: Nevada - Open to All Mineral Entry Under 202(d) of FLPMA

Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3809 Notices	Plans	Date of opening order	Number of claims located by year				
						80	81	82	83	84
III 257		1	0	0	10/31/83					
25710	56,343	4	0	0	10/31/83					7
1575		2	0	0	10/31/83					
1025	80	12	1	0	12/22/82				12	
1574	1,280	7	0	0	01/03/83					7
049008	428	19	0	1	02/05/82			5	34	
049787	144	1	0	0	02/17/82				1	
049778	80	9	1	0	10/29/81			4		4
049805	14,413	3	0	0	11/30/81			3		
049794	15,794	17	4	0	10/29/81			5	6	5
043486	40	3	0	0	10/14/81			1		
970	480	2	0	0	04/17/81			2		
3557	40	12	0	0	06/05/82			3		12
29762	118	3	0	0	08/27/81					
000000	669	12	0	0	18/12/81					12
5756	229	1	1	0	08/20/81					1
0030	946	20	1	0	08/20/81			20		
15497	80	1	1	0	18/30/81					1

Claims are located for all forms of commodities under the mining laws.

Claims are located for all forms of commodities under the mining laws.

STATE: Oregon - Open to All Mineral Entry Under 202(d) of FLPMA										
Action Number	Areas opened	Claims located after opening	Operating Under 43 CFR 3809 Notices	Plans	Date of opening order	Number of claims located by year				
						80	81	82	83	84
III OR 6409A	25,075	18	4	0	8/6/82				15	2
OR 13499	1,238	5	0	0	2/3/82				5	
OR 14746	40	7	0	0	4/15/82			7		
OR 6113	72	4	0	0	6/17/81		4			



IN THE UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF

v.

ROBERT F. BURFORD, *ET AL.*, DEFENDANTS

DECLARATION OF G. WILLIAM LAMB

I, G. William Lamb District Manager of the Bureau of Land Management's Arizona Strip District, declare under penalty of perjury that the following is true and correct to the best of my knowledge and belief.

There have been several withdrawals and classifications placed on the public lands in Arizona north of the Colorado River known as the Arizona Strip.

In 1930 Executive Order 5339 withdrew a large area along the Colorado River including a portion of the Shivwits Plateau (see attached map for detail). The withdrawal segregated the land from all forms of land disposal but was left open for metalliferous mineral exploration which included uranium, copper and other hard rock minerals. In 1948 a portion of that withdrawal located on the Shivwits Plateau was revoked. In 1964 Lake Mead National Recreation Area was established, and in 1975 the Grand Canyon was enlarged, these two Congressional land actions covered the major portion of the 1930 withdrawal and provided greater protection from mineral exploration than the original withdrawal. The remaining portion of the 1930 withdrawal was revoked in 1981 and 1982. There

is, however, over 100 sections of land within the original 1930 withdrawal on the Shivwits and Sanup Plateaus that are privately owned minerals that were not subject to the withdrawal segregations.

Departmental Orders between the years of 1953 and 1963 withdrew approximately 65,000 acres for water storage projects on the Colorado River below Glen Canyon. This action withdrew the land from all forms of appropriation under the public land laws, but in 1954 they were opened to mining location, entry and patents. With designation of the Paria Canyon Primitive Area in 1969 and establishment of the Glen Canyon National Recreation Area (NRA) in 1972, approximately 23,000 acres were returned back under the operation of the public land laws in 1981. The remaining acres were retained for Glen Canyon NRA and the Paria Primitive area. In 1984 approximately one half of the 23,000 acres that was lifted was included within the Paria Canyon-Vermilion Cliffs Wilderness Area. Approximately 42,000 acres of the original withdrawal continues to be protected under those withdrawals. Of these 42,000 acres approximately 30,000 acres are found within the Glen Canyon NRA, the Grand Canyon National Park, or the Paria Canyon-Vermilion Cliffs Wilderness Area. This provides double coverage from all form of land appropriation, but leaves the area open for water impoundment and storage along the Colorado River and its tributaries.

Between 1967 and 1970 approximately 2,566,000 acres of public land on the Arizona Strip was classified for multiple use management under the Multiple Use and Classification Act of 1964. This segregated the land from sale, agricultural and exchange laws except for 8,219 acres that was further segregated from the mining laws (see attached map for location of the 8,219 acres). Since these

classifications were determined to be unnecessary after the passage of FLPMA they were terminated in 1981. However, approximately 3,300 acres of the 8,219 acres which were segregated from the mining laws are still included in the Virgin River Gorge scenic withdrawal or the newly designated wilderness areas which continue to segregate these areas from all form of appropriation.

The majority of the land in the Arizona Strip has always been open to metalliferous exploration and development including uranium mining. While the actions taken since 1981 did open some of these lands to the mining laws, this is likely to have little effect on the uses of these lands because in our opinion they do not contain any nonmetalliferous mineral that can be economically mined.

/s/ G. William Lamb  
G. WILLIAM LAMB

[handwritten]  
9-4-86

IN THE UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF COLUMBIA

Civil Action No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF

v.

ROBERT F. BURFORD, ET AL., DEFENDANTS

DECLARATION OF JACK KELLY

I, Jack Kelly, under penalty of perjury state:

1. I am presently employed as the Lander, Wyoming Resource Area Manager, Bureau of Land Management (BLM), U.S. Department of the Interior, Lander, Wyoming.

2. I have served in my present position with the BLM since September 1983. Prior to that, I served as Assistant District Manager, Lands and Renewable Resources, for the Rawlins, Wyoming District of the BLM, from November 1978 to August 1983. On occasion during that period, I served as acting District Manager, Rawlins District. To date, I have been employed by the BLM over a period of fifteen (15) years.

3. My current job responsibilities include overall management and supervision over BLM's land management activities in the Lander Resource Area, which comprises in excess of 2.5 million acres of public domain lands situated in west-central Wyoming. Included within this large area is an area comprising approximately 1.2 million acres known as the Green Mountain area.

4. The Green Mountain area is basically composed of three relatively discrete areas. The Green Mountain-Crooks Mountain area is located in the southern portion of the overall area, and is situated approximately 60 miles east-southeast of Lander and immediately to the southwest and southeast of Jeffrey City, Wyoming. The predominate features of the area are Green Mountain and Crooks Mountain, each of which rises in excess of 2,000 feet above the surrounding plains and is characterized by steep slopes and dense lodgepole pine forests interspersed with meadows near the upper portion of the mountains. The Green Mountain-Crooks Mountain area is noteworthy primarily for its timber resources, deer and elk herds, recreation, and its valuable deposits of uranium.

5. The South Pass Area is located approximately 24 miles due south of Lander and is situated at the south end of the Wind River Mountain range. It is an important recreation area, and people come there to fish, hunt, camp, or partake of the rich historical and cultural heritage that exists by virtue of the South Pass Mining District, an active gold mining area that has been actively mined, commercially or recreationally, from the mid-19th century to the present.

6. The third general part of this area encompasses a vast amount of lands lying basically between the Green Mountain-Crooks Mountain Area and the South Pass Area, together with substantial amount of land lying to the south and north. This "third area" is significant for its rangeland, its fisheries, its wildlife habitat, for recreation, and for its important cultural resources, and for its leasible and locatable mineral resources.

7. Because of the rich ecological diversity of this area and because of its economic, environmental, recreational, and historical importance to the public, this area has been

carefully managed by BLM for many years. Of crucial significance to BLM's management efforts has been the development of comprehensive land use plans for the area.

8. Prior to 1977, the Green Mountain and South Pass areas were covered with the following land use plans:

- a. West Lander MFP
- b. Grainte Mountain MFP
- c. "Below the Rim" MFP
- d. Seven Lakes MFP

These were prepared and completed between 1969 and 1976.

9. In 1977, partly in anticipation of the need to prepare an environmental impact statement (EIS) on grazing and range management for the area, BLM began the process of preparing a new land use plan encompassing all of the Green Mountain area. This plan denominated a Management Framework Plan (MFP) in accordance with BLM's then applicable Manual, was to be prepared by personnel in the Lander Resource Area in cooperation with the Rawlins District Office and, to a lesser extent, with personnel from the Wyoming State office.

10. The initial steps in this planning effort consisted of the preparation of a Unit Resource Analyses (URA) for the entire area and the initiation of public involvement and participation efforts by BLM.

11. The Unit Resource Analyses for the MFP (named the Sweetwater and South-Moneta MFP or commonly called Green Mountain MFP) was prepared during 1977 and 1978. This MFP will hereinafter be referred to as the Green Mountain MFP. It consisted of the following steps:

- (a) URA Step 1 involved the preparation of a base map for the planning area. The base map indicated the boundaries of the planning unit, the areas ultimately to be covered by the Green Mountain

Grazing EIS, and land status (*i.e.*, ownership, withdrawals, etc.) of the lands within the planning unit.

(b) URA Step 2 involved a detailed description of the basic geographic and environmental characteristics of the overall area. This included information concerning climate, topography, vegetation, water resources animals (wild and domestic), fire dangers, any physical factors that would limit management opportunities and the kinds and amounts of resource development in the area.

(c) URA Step 3 involved the preparation of a description of the present management situation: *i.e.*, the status of wild/horse and range management, forestry, wildlife habitat, recreation, lands, and minerals.

(d) URA Step 4 involved a detailed analysis of the potential uses and opportunities for management with respect to each of the various resources in the area managed by BLM.

(e) The URA also included the preparation of an ecological profile of the area. Its purpose was to ascertain and describe any unique or fragile areas within the planning unit, including any areas of Critical Environmental Concern, to define the predominate land uses within the area, and to identify all important management consideration [*sic*] that would need to be taken into account in order to develop a land use plan sensitive to preserving and enhancing areas of ecological impacts.

In carrying out the URA process for the Green Mountain MFP, BLM followed the BLM Manual requirements set forth in BLM Manual Part 1605. Included within that process was an identification of the existence of any lands

segregated or withdrawn from multiple use management, including segregation from the application of the mining laws. (BLM Manual, § 1605 \_\_\_\_\_).

12. A true, genuine, and correct copy of the URA for the Green Mountain MFP, which was completed in 1978, is attached hereto and incorporated herein by reference as Exhibit 1.

13. During the period in which the URA was being prepared, BLM also initiated its public participation program for the Green Mountain MFP as well as the Green Mountain Grazing EIS. During 1977-1978, BLM engaged in approximately 80 individual contacts with the public regarding upcoming planning and EIS work for the area. These contacts consisted of telephone calls, personal interviews and discussions, receipt of correspondence from members of the public, group meetings and workshops. Each such contact was documented on a Form 1600-16. True, genuine and correct copies of the forms 1600-16 covering the period October 1976 to October 1978 are attached hereto and incorporated herein by reference as exhibits 2 and 3.

14. Throughout this same period, BLM was also conducting a number of other efforts to generate data and information to be used in the MFP and the Grazing EIS. Between 1976 and 1979 BLM conducted a stage II U.S. Forest Service intensive forest inventory to determine the volume/acre by timber type for use in managing commercial timber operations on the Lander Resource Area. During the same period, BLM conducted a vegetative survey for the Green Mountain area in order to collect information on plant composition and use by livestock. This information would later be used to determine carrying capacities and proper use levels by livestock (and wild horses) for each grazing allotment area. BLM conducted

wildlife inventories throughout the period and also obtained wildlife and fisheries data from the Wyoming Game and Fish Commission. Also, other data collecting efforts, such as minerals and soils inventories, were being conducted.

15. In 1978 and early 1979, BLM completed the MFP Step 1 process. This consisted of the development of objectives and recommendations by a team of resource specialists for the management of each resource within the area. The objectives and recommendations developed at this stage of the planning process were oriented towards managing the land so as to maximize the potential for each resource independently of every other resource in the area (*i.e.*, a "Blinders On" approach). Under this approach, for example, the wildlife specialist developed objectives and made planning recommendations oriented solely to the maximum enhancement of the area for wildlife habitat. The mineral and range management specialists did likewise for their respective resources. The purpose of this approach was to develop a set of proposals reflecting the optimum management possibilities for each resource. If, later in the planning process (*i.e.*, MFP Step II) conflicts with other resource objectives surfaced, the decisionmaker through this process would be assured of having before him a full range of management options for each resource. Similarly, if no such conflicts were to develop, this approach ensures that "non-conflict" resources could be managed at their optimum level.

16. During the summer of 1979, BLM developed draft MFP Step II recommendations. MFP Step II consisted of a multiple-use analysis of all of the objectives and recommendations developed by the resource specialists in Step I. This included an analysis of all of the potential social, economic, institutional, and environmental values in-

involved in or affected by the Step I recommendations, together with some tentative [*sic*] recommendations with respect to how conflicts in Step I objectives and recommendations might be resolved.

17. During the period when MFP Steps I and II were undertaken, BLM continued involving the public in its planning process. True, genuine and correct copies of its Forms 1600-16 reflecting the public involvement activities of BLM from October 1978 through October 1979 are attached hereto and incorporated herein by reference as Exhibit 4. Among the activities undertaken were meetings with the Green Mountain Monitoring Group (3/26/79), and meetings and contacts with ranchers, the Wyoming State Oil and Gas supervisor (7/26/79), the Forest Service, and many others. In addition, on July 30, 1979, BLM sent a letter to all interested individuals enclosing a discussion and brief explanation of the draft MFP-Step II proposals and announcing that an open house would be held on August 21 and 22, 1979, and that a public meeting would be held on the evening of August 22, 1979, to receive the public comments on the draft MFP Step II proposals. A copy of the July 30, 1979, letter and enclosure is included within Exhibit 4, *supra*. A true, genuine and correct copy of the mailing list reflecting the persons or individuals to whom this letter was sent is attached as Exhibit 5.

18. On August 21 and 22, 1979, an open house on the draft MFP Step II proposals was conducted at the Lander Resource Area Office.

19. On the evening of August 22, 1979, a formal public hearing was held at the Lander Valley High School Auditorium. The purpose of the public hearing was to explain to the public BLM's land use planning process and to provide the public with an opportunity to comment on the draft MFP-Step II proposals. The proposed review of the

areas segregated from mining location pursuant to classification W-6228 were specifically discussed by the Lander Resources Manager (see Transcript, at 9). The hearing was also devoted to obtaining public input relative to identifying important issues to be addressed in the Green Mountain grazing EIS. A true, genuine and correct copy of the Transcript of the August 22, 1979 public hearing is attached hereto and incorporated herein as Exhibit 6. In addition, a true, genuine, and correct copy of the record of the public open houses on August 21 and 22, 1979, is attached hereto and incorporated herein as Exhibit 7.\*

20. Following the Public Hearing, BLM continued work on the Green Mountain MFP. By November of 1981, BLM had completed the process of reaching proposed MFP Step III multiple use decisions based on the Step II recommendations and multiple use analysis and on the input received from the public. On Wednesday, September 30, 1981, BLM published a notice in the Federal Register indicating that BLM would in fact be preparing a grazing EIS for Green Mountain based on range management planning recommendations developed pursuant to the MFP process. The Notice also announced a public scoping meeting to be held on November 2, 1981. The purpose of the meeting was:

- (1) to provide the public with an opportunity to comment on [the] proposed management framework plan decisions not directly related to rangeland management; (2) to present rangeland management multiple use planning recommendations to the public; (3) to inform the public of the proposed action and tentative

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\* Written comments received relative to BLM's MFP Step II proposals are including within Exhibit 4.

alternatives that BLM proposes to analyze in the EIS; (4) to gather resource information from the public; and (5) to identify concerns and issues important to the public for possible inclusion into the EIS or into planning system decisions. Comments received at this scoping meeting will be used in developing the EIS and the planning decisions that result.

46 Fed. Reg. 47873.

A true, genuine and correct copy of the above-referenced Federal Register Notice is attached hereto and incorporated herein by reference as Exhibit 8.

21. On November 2, 1981, the above-indicated public hearing was held at the Fremont County Library in Lander, Wyoming. The proposal to review lands segregated from mineral entry were [sic] once again discussed by the Lander Resources Manager at the hearing. (See Transcript, at 9). A true, genuine and correct copy of the transcript of the public hearing is attached hereto and incorporated herein by reference as Exhibit 9. A true, genuine and correct copy of the attendance list at the hearing is attached hereto and incorporated herein by reference as Exhibit 10.

22. On December 2, 1981, 30 days subsequent to the November 2, 1981 public hearing, the Green Mountain MFP Step III decisions not directly relating to rangeland management became final.

23. Throughout the above-described MFP process, attention was given to whether a number of then existing segregations from the general mining laws, 30 U.S.C. § 21 *et seq.*, should be continued. The most significant of these segregations was imposed as a result of a then-existing Multiple Use classification dating back to 1967 (as amended in 1970).

24. On November 22, 1967, approximately 2,077,702 acres of public lands in the general Green Mountain-South Pass area in Fremont and Natrona Counties in Wyoming were classified for multiple use management pursuant to the Classification and Multiple Use Act of 1964, 43 U.S.C. § 1411. All of this land was thereby segregated from appropriation under the agricultural land laws and from sales pursuant to Section 2455 of the Revised Statutes (43 U.S.C. § 1171). In addition, approximately 4,128 acres within this area was further segregated from appropriation under the general mining laws, 30 U.S.C. § 21. (See 32 Fed. Reg. 16057, with reference to Multiple Use Classification W-6228).

25. On December 1, 1970, this classification was amended in order to segregate an additional 2,251 acres in Fremont County, Wyoming, from the operation of the general mining laws. (See 35 Fed. Reg. 18682-83, December 9, 1970).

26. True, genuine, and correct copies of both of the above classification notices are included within the certified copy of the complete multiple use management classification File W-6228 (W-6228 File) attached hereto and incorporated herein by reference as Exhibit 11.

27. Of the total 6,373 acre area segregated from operation of the general mining laws, 1,825.93 acres were in the Green Mountain-Crooks Mountain area; 3,773 acres were in the South Pass area, and an additional 610 acres were scattered throughout the Lander Resource area on four sites: Castle Gardens (80 acres); Lost Cabin (320 acres); Beaver Rim (170 acres); and Hall Creek (40 acres). The location of these scattered tracts are more particularly described in the Environmental Assessment land report on the C&MU classification Review of W-6228, included within the W-6228 file. The Lost Cabin tract (320 acres)

and the Castle Garden Tract (80 acres) were not encompassed within the Green Mountain MFP.

28. Throughout the URA, Planning Area Analysis (PAA), and MFP processes, consideration was given to the need to review the mineral entry segregations in the Green Mountain and South Pass areas created by W-6228 in order to determine whether their retention was still necessary or appropriate. In the Minerals Section of the MFP, for example, the MFP Step I Objective was stated as being to open to mineral location approximately 9,800 acres in the South Pass Mining District then segregated from mineral location, (Sweetwater MFP M-7).<sup>\*</sup> In keeping with that objective, the MFP Step I recommendation was that the mineral entry segregation for the South Pass area established by W-6228 be revoked by 1984. (Recommendation M-7.1).<sup>\*\*</sup>

29. Similarly, in the uranium portion of the minerals section there was an MFP Step I recommendation that the mineral segregation established by W-6228 be revoked on Green Mountain because of the existence of valuable and important uranium deposits located in this area. (Recommendation M-5.3).

30. During the MPF-Step II Multiple Use Analysis, several conflicts with other resource programs were identified. With respect to the South Pass area, it was noted that the original segregations were made to protect the areas for recreational use. It was further noted that most

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<sup>\*</sup> This 9,800 acres included lands in four old mining districts—South Pass, Miners Delight, Atlantic City, and Lewiston. Approximately 3,800 of these acres were segregated from mineral entry by virtue of Classification W-6228.

<sup>\*\*</sup> The rationale for this recommendation was the possible existence of a multi-million dollar gold deposit within the South Pass District, the rising value of gold, and the then existing U.S. gold deficit.

of the segregated sites were located within the South Pass Historic District, and classed as "Class 2" visual area, and that new mineral exploration or development could interfere with the areas' value for this purpose. The Step II analysis also noted potential adverse affects [sic] on important historic or cultural sites, with forestry management, and with the maintenance of important fish and wildlife habitat.

31. As a result of the Step II Multiple Use Analysis, the Step I recommendation was modified to call for a careful site-by-site multiple use evaluation in accordance with FLPMA to determine—for each site—whether the existing segregation should be retained, modified, or eliminated. (Multiple Use Analysis and Recommendation, M-7.1).

32. A similar Multiple Use Analysis was undertaken with respect to the segregations in the Green Mountain area. After noting potential conflict with existing campgrounds, important visual or scenic resources and important fish and wildlife habitat, the Step I recommendation to eliminate the segregation in total was modified to provide for a site-by-site multiple resource evaluation to determine whether the segregation should be retained, modified, or revoked. (Multiple Use Analysis and Recommendation, M-5.3).

33. The above-referenced Step I Recommendations and Step II Multiple Use Analysis and Recommendations (in draft form) were made available to the public at the August 21-22, 1979 open houses and at the August 22, 1979 public hearing. In addition, the Step I Recommendations, the final Step II Multiple Use Analysis and Recommendations, and BLM's proposed Step III decisions were presented to the public for review in connection with the November 2, 1981 public hearing on the Green Mountain MFP.

34. Following the completion of the MFP, BLM undertook the site-by-site multiple use analysis of these mineral segregations pursuant to the decisions reached through the MFP process. On September 23, 1982, that review was completed. On that date, BLM issued its Decision Record, which consisted of an Environmental Assessment/Land Report Wy031-2-1776, mineral reports, maps, and other attachments. BLM's final decision was to terminate the mineral segregation on approximately 5,120 acres of the 6,379 acres originally segregated by W-6228. By area, the segregation was to be retained on approximately 959 acres in the South Pass area in order to protect wildlife values (Environmental Assessment, Part II Recommendation and Rationale); retained on approximately 120 acres in the Green Mountain area in order to protect significant recreation sites (Environmental Assessment, Part I Recommendation and Rationale); and retained on approximately 180 acres in the Castle Gardens (80) and Beaver Rim (100) areas in order to protect respectively an important archeological site and a proposed "Area of Critical Environmental Concern." (Environmental Assessment, Part III Recommendations and Rationales).

35. BLM made four separate consistency determinations with regard to the foregoing review. First, in its Categorical Exclusion Decision Record with regard to the termination of Classification W-6228 (exclusive of the mineral segregations), BLM concluded that termination was consistent with the Sweetwater-Moneta MFP (Attachment "D", Environmental Assessment/Land Report). Second, with regard to the mineral segregations on Green Mountain and in the South Pass area, BLM made separate determinations that each modification was consistent with the Sweetwater (or Green Mountain) MFP, Sections M-5.3 and 7.1, respectively. (Decision Factors, Parts I and II, Environmental Assessment/Land Report). Finally, with

regard to the scattered tracts, BLM determined that the proposed modifications with regard to the Beaver Rim Area were consistent with Moneta (Green Mountain) MFP Sections M-4.1, F-2, and WL-9-1.1. While no such specific finding was made, with respect to [sic] the Hall Creek area, it is my judgment that termination of the mineral segregation with respect to it (40 acres) was also consistent with the Green Mountain MFP. The other two scattered tracts—Castle Gardens (80 acres) and Lost Cabin (320 acres) were located within the “Below the Rim” MFP Planning Unit. As noted above, the decision was made to retain the Castle Gardens mineral segregation in its entirety. With respect to the Lost Cabin mineral segregation, while no specific consistency determination with the Below the Rim MFP was made, the Environmental Assessment/Land Report demonstrates the lack of any continuing justification for this isolated segregation and its termination was not in my judgment, inconsistent in any respect with the “Below the Rim” MFP.\*

36. Subsequent to the issuance of BLM’s Decision Record and Environmental Assessment/Land Report, the Wyoming State Game and Fish Department raised some additional concerns regarding the impacts that terminating mineral segregations in the South Pass area might have on critical winter moose habitat. In addition, individuals interested in mining opportunities in the South Pass area

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\* The “Below the Rim” MFP was completed in 1972. It was reaffirmed and determined to be in compliance with FLPMA’s land use planning requirements in March of 1980 pursuant to 43 C.F.R. § 1601.8 (1/79). In that connection, it was determined that the “Below the Rim” MFP fully complied with FLPMA’s principles of multiple use and sustained yield management, and was prepared and developed with sufficient opportunities for public participation and with sufficient intergovernmental coordination with state, county, and local agencies.

raised concerns regarding the retention of some segregations. Between September of 1982 and March of 1984, BLM reviewed its September 23, 1982 Decision in light of these concerns.

37. As a result of that review, BLM determined that the segregation on an additional 768.47 acres in the South Pass area be retained in order to protect high value wildlife habitat. (March 26, 1984 Memorandum from Rawlins, District Manager to the State Director, which is included within the W-6228 File).

38. As a result of the above change, BLM’s final determinations was [sic] to terminate W-6228’s mineral segregation with respect to 4,455.06 acres, and to retain the segregation on 1,913.47 acres. This final determination was announced in the Federal Register on May 10, 1984 (49 Fed. Reg. 19904-05, a copy of which is included within W-6228 File).

39. In December of 1982, the Green Mountain Final Grazing EIS, which was prepared in conjunction with the 1981 Sweetwater-Moneta MFP, was issued in final form.

40. Finally, it should be noted that BLM has undertaken additional planning activities in the Green Mountain-South Pass area, and that those activities have included a further evaluation of whether—in whole or in part—lands within the area should be segregated from mineral entry.

41. In January of 1984, BLM announced that it was initiating a Resource Management Plan for the Lander Resource area. (49 Fed. Reg. 3278 [January 26, 1984] a true, genuine and correct copy of which is attached hereto and incorporated herein as Exhibit 12). In connection with this process, open house—public meetings were held in Lander, Jeffrey City, Atlantic City, and Dubois on November 5-8, 1984, in order to collect data, to receive

input from the public, and to explain the RMP process to the public.

42. In November of 1985, the Draft Lander Resource Area RMP/Environmental Impact Statement was published. Among the alternatives considered with respect to the South Pass area were ones addressing whether the entire South Pass area should remain open to mining (excepting the areas kept segregated pursuant to the 1984 W-6228 decision); whether the entire area previously segregated should be withdrawn from mineral entry; whether the entire area should be opened to mining, but under circumstances where approved plans of operation would be required for all mining activities; and whether the present situation, including the segregations retained by the 1984 W-6228 Decision, should be maintained, except that all future mining activities in the area would require approved plans of operation (the preferred alternative).

43. Almost the same array of alternatives was provided with respect to the Green Mountain area, except that the draft failed to consider as an alternative whether the areas previously segregated from mining by W-6228 should now formally be withdrawn. This alternative will, however, be included in the Final RMP/EIS as a result of comments from, among others, the plaintiff in the above-captioned litigation.

44. On December 11 and 12, 1985, public hearings were held on the draft RMP/EIS in Dubois and Lander, respectively. The hearings were announced in the Federal Register on November 5, 1985 (50 Fed. Reg. 45943, a true, genuine and correct copy of which is attached hereto and incorporated herein by reference as Exhibit 13).

45. On November 7, 1985, BLM also announced its intention to prepare a Wilderness Study Supplement to the RMP/EIS, the scoping meetings for which were held in

conjunction with the above noted public hearings on the draft (50 Fed. Reg. 46361, a true, genuine and correct copy of which is attached hereto and incorporated herein by reference as Exhibit 14).

46. On February 18, 1986, BLM received written comments on the Draft RMP/EIS from the National Wildlife Federation.

47. On February 14, 1986, the 90 day comment period on the Draft RMP/EIS ended. A true, genuine, and correct copy of the Draft RMP/EIS is attached hereto and incorporated herein by reference as Exhibit 15.

48. On or about October 30, 1986, the Final RMP/EIS on the Lander Resource Area, which includes the area covered by W-6228, will be distributed to the public.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Dated this 4th day of September, 1986.

/s/ JACK KELLY

Jack Kelly

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF

v.

ROBERT F. BURFORD, DONALD P. HODEL, AND THE UNITED  
STATES DEPARTMENT OF THE INTERIOR, DEFENDANT

DECLARATION NO. 2 OF VINCENT J. HECKER

I. INTRODUCTION

1. I, Vincent J. Hecker, Chief, Division of Lands, of the Bureau of Land Management (BLM), United States Department of the Interior, hereby declare under penalty of perjury that the information contained in this declaration is true and accurate to the best of my knowledge. Some of the details in this declaration have been supplied by my subordinates or other sources within BLM.

2. A withdrawal is the means by which a specified tract of land is removed, *i.e.*, segregated, from the application or operation of one or more of the public land laws. See James Parker Affidavit at ¶ 5. During the early 1900s, the vast majority of the public lands of the United States were open to appropriation under a variety of laws, *e.g.*, the Homestead Act, the Mining Law of 1872, the Isolated Tract Act, and the Small Tract Act. Withdrawals were used to remove the lands from the operation of these laws and, generally, to reserve the lands for specific uses, *e.g.*, a military base. Federal agencies could also request

that lands be withdrawn on their behalf for specific agency purposes, *e.g.*, lands were withdrawn for the Bureau of Reclamation for use in dam construction or agricultural development or by the military departments for various defense needs.

3. Although withdrawals were made as early as the Nineteenth Century by the President, the first congressional authority for Presidential withdrawals was enacted in 1910, 36 Stat. 847 (Pickett Act). This act specified that withdrawals were "temporary" in nature, and that the segregative effect of a withdrawal would continue until the withdrawal was modified, revoked or vacated. By the mid 1950's faced with a large number of withdrawals, covering millions of acres of the public lands, Interior concluded that some form of withdrawal review was necessary. Many withdrawals were outdated, proposed projects abandoned, land character changed and/or the best utilization of the lands lay in some other land management function. In addition, numerous agencies on whose behalf a withdrawal had been made either no longer had a need for it or in a few instances, the agency itself had ceased to exist

4. The early objective of withdrawal review were:

- (a) To reduce withdrawals to the minimum level consistent with program purposes;
- (b) To maximize public and private use of withdrawn lands consistent with the purpose of the withdrawals; and
- (c) To eliminate all unnecessary withdrawals.

See Exhibit 2 to Edwards' Affidavit 1B and accompanying texts. Efforts were also made to coordinate withdrawal review with general land use planning activities. See *id.*

5. With the enactment of the Federal Land Policy Management Act in 1976 (FLPMA), the Secretary of the Interior (Secretary) received general authority to "make,

modify, extend or revoke" withdrawals under Section 204(a). This general authority has been used to revoke withdrawals since the passage of FLPMA. For a detailed discussion of the procedures relied on to revoke withdrawals, see Edwards Affidavit 1A at ¶ 5- ¶ 11; Parker Affidavit ¶ 19-¶ 23 and accompanying exhibits.

6. In 1980, the Solicitor's office issued an opinion which concluded that the withdrawal review and termination provisions of section 204(l) were self-contained. It further stated that withdrawals could be revoked, if necessary, under the authority of section 204(a) of FLPMA in order to complete ongoing projects, *e.g.*, exchanges, sales, State in-lieu selections and relinquishments in the "ordinary course of business." Thus, individual proposed revocation action arising in the ordinary course of business, including withdrawals relinquished by other Federal agencies as no longer needed, could be completed under section 204(a). Moreover, section 204(l), by its own terms was limited both geographically and to certain types of withdrawals. Even though BLM was undertaking to move forward with withdrawal revocations in the 1970s, it was still criticized by the General Accounting Office in 1982 for not giving priority to reviewing and terminating withdrawals which segregated the land from mineral entry and development. See exhibit 23 to Edwards' affidavit 1B.

7. Withdrawals which were revoked in the ordinary course of business were grouped into two broad categories:

A. *Withdrawal relinquishments.* A withdrawal is relinquished when the Department or agency (holding agency) on whose behalf the withdrawal was made files a notice of intent to relinquish the withdrawal along with supplying Interior with supporting documentation showing the land is no longer needed

for the purpose for which it was originally withdrawn. Prior to FLPMA's passage, a number of withdrawals had been relinquished by holding agencies (some of which dated back to the 1940s and 1950s) but which had not been processed to completion. Such relinquishments were made by holding agencies pursuant to regulations at 43 C.F.R. 2370 which were developed prior to FLPMA. Only after the revocation by the Secretary became effected [*sic*], were the lands "public lands" subject to BLM's administration. See ¶ 21 of Parker Affidavit for more detail on withdrawal relinquishment procedures. Hereinafter, withdrawal revocations following relinquishments by other Federal agencies are referred to as Category A revocations.

B. *Pending Land Actions.* On many occasions in the past, withdrawals were used to prevent alienation of the Government's title under certain discretionary public land laws, *e.g.*, exchange, State selection and sale laws. If the BLM received a request to sell or exchange or open the land to multiple use, the withdrawal prohibiting such a proposal, along with its segregative effect, had to be revoked or modified to permit implementation of the proposed action. However, prior to allowing the sale or exchange or specific use to proceed, appropriate NEPA compliance and public comment was obtained on the proposed action. Hereinafter, withdrawal revocations made to allow a subsequent proposed action to proceed are referred to as Category B revocations.

8. *Record Clearing.* A third basis for revoking withdrawals was simply for record clearing purposes. Record clearing falls into three general categories. First, over the years, public lands covered by withdrawals were

transferred from Federal ownership by various means including Reclamation homesteads. Yet, the withdrawals were never revoked. Second, some public lands were covered by one or more layered or overlapping, withdrawals which provided equal or greater protection and, thus, to revoke one had no effect on the land. Third, withdrawn lands were protected by congressional action, e.g., the withdrawals had been superseded through the creation of national recreation areas, monuments, or parks. However, as the withdrawals in these three categories were never revoked, the land records indicated that BLM or some other Federal agency retained jurisdiction over the lands and hence was responsible for their management in accordance with FLPMA's objectives of multiple use and sustained yield. In order to reconcile the public land records with the current status of the land, withdrawals were deleted from the public records as a mere record clearing action. Hereinafter, withdrawals revoked for purposes of record clearing are referred to as Category C revocations.

9. The Bureau also revoked some withdrawals on its own initiative. Withdrawals revoked that fall within this category such as stock driveway withdrawals, are those that meet none of the three previously described categories and do not fall within any other legal prescription. These refer to withdrawals not covered by 204(f) either as to the type of withdrawal or as to the geographical location of the withdrawal. Hereinafter, withdrawals revoked on BLM's own initiative are referred to as Category D revocations.

10. Since January 1, 1981, the Secretary has issued 647 public land orders revoking or modifying a total of 18,991,920 acres. The general effect of the revocations was to restore the land to multiple use management pursuant

to Section 102(a)(7) of FLPMA. These totals fall within the four categories defined above as follows<sup>1</sup> :

- A. In category A, (withdrawals relinquished by other Federal agencies and revoked in the ordinary course of business), 194 withdrawals were revoked and/or modified covering 1,735,856 acres.
- B. In Category B, (withdrawals revoked to permit a proposed land action to proceed and thus revoked in the ordinary course of business), 72 withdrawals were revoked and/or modified covering a total of 90,651 acres.
- C. In Category C, (record clearing), 211 withdrawals were revoked and/or modified covering a total of 4,844,853 acres.
- D. In Category D, (BLM's own initiative), 170 withdrawals were revoked and/or modified covering a total of 12,320,560 acres. See exhibits 1-14.<sup>2</sup>

11. Due to the extensive number of withdrawals involved in revocation and modification actions since January 1, 1981, it is impossible to discuss with specificity each one. However, some random, representative examples follow with regard to each category.

<sup>1</sup> The PLO totals reflected herein have been calculated on the following basis: if they were revoked under the authority of more than one category, they have been counted only once and only in the category where the greatest amount of acreage appears.

<sup>2</sup> The figures in Exhibits 1-14 were derived from the Public Land Orders and supporting case files of the BLM. Every effort has been made to make them as correct as possible. However, we are continuing to review these statistics and, if necessary, we will file an errata sheet showing any corrections that are made in view of our ongoing review.

A. With regard to Category A revocations:

(1) PLO 5810 in Oregon had withdrawn 80 acres of lands for use by the Forest Service as a ranger station, within a national forest, which the Forest Service determined it was no longer needed and, thus, relinquished the withdrawal. The withdrawal was revoked on January 22, 1981. Also in Oregon, PLO 6412 revoked a withdrawal covering 238 acres that had been withdrawn on behalf of the Bureau of Reclamation in connection with the Rogue River Project which the Bureau of Reclamation had determined it no longer needed. This withdrawal was revoked on July 19, 1983.

(2) In Idaho, PLO 6568 revoked a withdrawal covering 120 acres on October 23, 1984, which had been withdrawn on behalf of the Bureau of Reclamation for the Southwest Idaho Water Management Study Area. The Bureau of Reclamation had determined that the area was no longer needed for its purposes.

(3) In the State of Florida, the Executive Order of October 29, 1900, had withdrawn 40 acres for use as a lighthouse by the military which was no longer needed. The withdrawal was relinquished, and subsequently revoked by PLO 6083 on November 19, 1981.

(4) In California, PLO 5931 restored 651 acres which had been withdrawn for the Department of Army for military training purposes. The revocation followed relinquishment by the Department of the Army, and became effective on May 29, 1981.

(5) In Arizona, PLO 5868 revoked a withdrawal involving 32,246 acres which had been

withdrawn on behalf of the Department of the Army in connection with the Yuma Test Station. Following the Department of the Army's determination that the withdrawal was no longer necessary, the withdrawal was relinquished by the Army and revoked by the Secretary on June 20, 1981.

(6) In the State of Nevada, a withdrawal had removed 640 acres from the operation of the public land laws for use by the National Park Service as an administrative site. Following relinquishment by the National Park Service, the withdrawal was revoked, and the lands restored to multiple use management on January 8, 1981, by PLO 5798.

(7) In the State of Utah, a withdrawal made on behalf of the Bureau of Reclamation in connection with the Bonneville Unit of the Central Utah Project was revoked on October 29, 1981, by PLO 6023 which restored 1,278 acres to multiple use management following relinquishment by the Bureau of Reclamation.

(8) In Colorado, 441 acres of public lands were withdrawn for the Bureau of Reclamation for the Collbran Project. Following a determination that the withdrawal was no longer needed, the withdrawal was relinquished by the Bureau of Reclamation and revoked by the Secretary on February 5, 1982, by PLO 6113.

(9) In New Mexico, PLO 5827 revoked a withdrawal covering 53,654 acres originally made on behalf of the Air Force for the operation of the Sacramento Peak Upper Air Research Site. Following relinquishment by the Air Force,

the Secretary revoked the withdrawal on January 23, 1981.

(10) In the State of Washington, the Coast Guard had withdrawn 11 acres for use as a light-house station. Following relinquishment by the Coast Guard, the withdrawal was revoked by the Secretary on February 5, 1982, by PLO 6120.

(11) Finally, in Montana, PLO 6205 revoked a withdrawal covering 287 acres which had been withdrawn on behalf of the Army for military purposes.

B. With regard to withdrawal revocations that fall within Category B:

(1) In Colorado, PLO 6102, revoked a 1944 powersite classification which lacked powersite values to "permit consummation of a pending exchange between the Forest Service and the Colorado State Board of Agriculture on 200 acres of land." The revocation became effective on February 5, 1982.

(2) In Utah, PLO 6599 revoked a withdrawal involving 40 acres as "the land has been identified for 'in lieu' State selection rights by the State of Utah." The revocation was effective on April 1, 1985.

(3) In Montana, PLO 6431 revoked a withdrawal covering 160 acres because such was "necessary to facilitate a Forest Service exchange." The revocation became effective on July 21, 1983.

(4) In the State of Washington, PLO 6447 revoked a withdrawal covering more than 6,500 acres, of which 1,319 acres "will be restored to State indemnity selection." It became effective on July 28, 1983.

(5) In Wyoming, PLO 6337 revoked a withdrawal covering 2.5 acres and "the subject land will not be restored to operation of public land laws since sale of the lands to private interest is planned." The revocation became effective on September 10, 1982.

(6) Finally, in Idaho, PLO 6426 revoked a withdrawal covering 320 acres to allow, in part, "consummation of the pending Forest Service land exchange with the State of Idaho."

The foregoing are examples of revocations falling within Category B that were completed in the ordinary course of business and permitted a then pending land transaction to be completed. The examples are not meant to be all inclusive. They constitute random, representative examples of the types of withdrawal revocations that are within Category B.

C. Category C, that is, record clearing, constitutes the largest category of revocations in terms of PLOs effected by the Secretary since January 1, 1981. One-third of all revocations are in this category.

(1) In the State of Idaho, PLO 6436 revoked a withdrawal involving 260 acres which "were conveyed out of Federal ownership without mineral reservation and will not be restored to surface entry, mining or mineral leasing. As such, this revocation is for record clearing only." It became effective July 25, 1983.

(2) In Oregon, PLO 6089 revoked a withdrawal covering 160 acres of land that had been withdrawn as a powersite reserve but had thereafter been transferred to private ownership. This revocation became effective on November 23, 1981. Also in Oregon, PLO 6512 revoked a Sec-

retarial order as to 2,998 acres of public lands that "have been conveyed out of Federal ownership and will not be restored to surface entry mining or mineral leasing." The revocation became effective on February 4, 1984.

(3) In California, PLO 6394 revoked four powersite reserves affecting 6,118 acres, all of which "remain withdrawn from disposition under the public land laws for the protection of the City of Los Angeles watershed by the Act of Congress dated March 4, 1931, or by Executive Order No. 6206 of July 16, 1933." This record clearing revocation was completed on June 28, 1983.

(4) In Wyoming, PLO 6397 revoked a withdrawal covering 25,402 acres and all but 600 were "subject to other overlapping withdrawals and, as such, will not be open to mining locations." The revocation became effective on June 28, 1983.

(5) In the State of Washington, PLO 6161 revoked a Secretarial order involving 158 acres but "the lands will not be restored to operation of the public land laws because they remain withdrawn for the Dungeness National Wildlife Refuge." The revocation became effective October 18, 1982. Also in Washington State, PLO 5815 revoked a withdrawal affecting 0.95 acres of land which, after the revocation, remain segregated from the public land laws and mining laws because of a "Recreation and Public Purposes Act classification WA 03675." The revocation became effective on January 22, 1981.

(6) In Montana, PLO 5854 revoked a withdrawal involving 120 acres which had previously

"been patented to the [Montana] State Fish and Game Commission." The revocation became effective on January 27, 1981.

(7) Finally, in Arizona, PLO 5976 revoked a withdrawal involving 1,199,267 acres of land in Arizona of which 1,009,610 acres had been conveyed into private ownership or were contained within other withdrawals. Thus, the land remained closed to all forms of appropriation following revocation. Revocation became effective on August 5, 1981.

The foregoing examples of revocations falling within Category C, that is, for mere record clearing, are not meant to be all inclusive. They are only random, representative examples of the type of revocations made solely for record clearing purposes.

D. Revocations that were undertaken by BLM on its own initiative are discussed below.

(1) In Arizona, five withdrawals were revoked. Executive Order 5339 withdrew 1,199,627 acres of land in Arizona in aid of legislation pending determination as to the advisability of including the lands in a national monument. Following congressional action creating the national monument, 189,657 acres remained outside of the Congressionally designated monument area. In light of the fact that this acreage was no longer needed, because Congress had acted, the withdrawal was revoked by PLO 5976. The lands had never been closed to metalliferous mining and mineral leasing. Of the remaining four withdrawals in this category that were revoked in Arizona, one (PLO 6156) covered land previously *not* closed to mining and/or mineral leasing.

The three remaining withdrawals that were revoked had only closed the lands involved to non-metalliferous mining; the lands had always been open to metalliferous mining and mineral leasing. Thus, none of the lands involved on these five withdrawals were restored to both all forms of mining or mineral leasing in Arizona as a result of the withdrawals revoked in this category.

(2) Of the ten revocations in the State of Utah which fall within this category, eight revoked withdrawals that had never closed the land to metalliferous mining or mineral leasing. The revocations opened the lands to nonmetalliferous mining only. The ninth revocation (PLO 6075) did not open the lands to any type of mining or mineral activity but only to sales and exchanges. Only one of the ten revocations in Utah (PLO 5849) restored the lands to both mining and mineral leasing and it involved only 160 acres.

(3) In Colorado, three revocations fall within this category. Two of them (PLOs 6164 and 6218) involve withdrawals which had never removed the land from the operation of mining and mineral leasing laws, while the third (PLO 6549) involved lands that had always been opened to mineral leasing and metalliferous mining. It only restored 40 acres of the land to non-metalliferous mining.

(4) In Nevada, seven revocations fall within this category. Of them, two (PLOs 6524 and 5899) involve lands that had never been closed to mining or mineral leasing. Two others (PLO 6108 and 6081) involved lands that had always remained open to metalliferous mining and mineral leasing and only restored the lands to

nonmetalliferous mining. A fifth (PLO 6472) involving 20 acres, restored lands to mining; the land had always been open to mineral leasing. The remaining two PLO's in Nevada in this category revoked withdrawals which "temporarily withdrew . . . lands considered valuable for oil shale" (PLO's 5917 and 6308). Of these two, one (PLO 6308) involved land that had always been open to metalliferous mining and oil and gas, sodium, and geothermal leasing. The other (PLO 5917) did not open the lands to mining or mineral leasing.

(5) In Montana, no revocations occurred which fall within this category.

(6) In the State of Washington, the eight revocations within this category did not open any new land to mining or mineral leasing activities. Five of the withdrawals that were revoked involved land that had never been closed to any mining or mineral leasing activities and three involved lands that had been closed only to non-metalliferous mining.

(7) In New Mexico, 15 revocations were made which fall either in whole or in part within into Category D. None restored lands to both all forms of mining or mineral leasing activity. Of the 14, eight restored lands only to nonmetalliferous mining, lands which had always been open to metalliferous mining and mineral leasing. The others involved lands that had always been open to both forms of mining and mineral leasing.

(8) In Wyoming, 14 revocations were made which fall within Category D. Four revocations (PLOs 6059, 6140, 6036 and 5862) involved lands

that had never been closed to mining or mineral leasing and thus did not open the lands to any new mining or mineral leasing activities. Five PLOs (6043, 6053, 5950, 6377, and 6455) involved lands that had always been open to metalliferous mining and mineral leasing. The PLOs reopened the lands to nonmetalliferous mining. Two of the PLOs (6114 and 6220) involved lands always open to mineral leasing but restored lands to mining. Three revocations (PLO 6123, 6186, and 6157) did reopen lands to mining and mineral leasing. However, out of the total of 96,963 withdrawn acres revoked in this category in Wyoming, the three revocations which reopened lands to mining and mineral leasing comprised only 396 acres.

(9) In California, 21 revocations were effected within this category. Of them, four PLOs (6432, 6376, 6358 and 6153) involved lands that had never been closed to mineral leasing or mining activities. Four revocations (PLO 6336, 6058, 6015 and 5830) involved lands that had always been open to mineral leasing activities, but were reopened to mining activities. Two PLOs (6068 and 5942) involved lands that were always open to mineral leasing but remain closed to mining activities. The remaining 11 revocations in California involved lands that had always been open to mineral leasing and metalliferous mining, but were reopened to nonmetalliferous mining. Thus, of the 21 revocations in California, none restored lands to both mining and mineral leasing.

(10) Nearly half of all revocations in Category D were completed in the State of Oregon.

Ninety revocations covering 55,290 acres were undertaken by BLM on its own initiative in Oregon. Of these, 33 involved lands that had always been open to mining and mineral leasing, 40 revocations involved lands that had always been open to mineral leasing and metalliferous mining, with the revocation merely reopening the land to nonmetalliferous mining. Twelve revocations involved land that had always been open to mineral leasing, but reopened the land to mining. Five revocations involving 562 acres opened the lands to both mining and mineral leasing.

(11) In Idaho, 18 revocations fell within Category D. Of these, 12 involved lands that had always been open to mining and mineral leasing. Three involved lands that had always been open to mineral leasing and metalliferous mining, and only restored lands to nonmetalliferous mining. Two involved lands restored to mining, lands that had previously been opened to mineral leasing. Only one revocation, involving 84 acres, restored land to both mining and mineral leasing.

(12) In Alaska (which is not included within the mandate of FLPMA § 204(1), one PLO was issued, revoking over 5.5 million acres which restored the land to a variety of uses.

12. In sum, of the 647 revocations that were completed since January 1, 1981, covering 18,991,920 acres, 266 of these revocations, covering 1,826,507 acres, were revoked in the ordinary course of business. An additional 211 revocations covering 4,844,853 acres were merely record clearing transactions. Of the remaining 170 revocations, involving 12,320,560 acres, only 10 revocations in the lower 48 States involving 1,201 acres restored land to both all forms of mining and mineral leasing.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct to the best of my knowledge.

/s/ VINCENT J. HECKER  
Vincent J. Hecker

Sept. 5, 1986  
Date

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF

v.

ROBERT F. BURFORD, DONALD P. HODEL, AND THE UNITED  
STATES DEPARTMENT OF THE INTERIOR, DEFENDANT

DECLARATION NO. 3 OF VINCENT J. HECKER

I. INTRODUCTION

1. I, Vincent J. Hecker, Chief, Division of Lands, of the Bureau of Land Management (BLM), United States Department of the Interior, hereby declare under penalty of perjury that the information contained in this declaration is true and accurate to the best of my knowledge. Some of the details in this declaration have been supplied by my subordinates or other sources within BLM.

2. Land classifications are similar to withdrawals in that they both segregate the land from the operation of a particular law and reserve and/or dedicate the lands for a specific use or uses. They differ both in their origin and how they are effectuated. Withdrawals can only be made at the Secretarial level while the authority to make classifications has been delegated to State Directors who in turn can delegate that authority to the district managers. It was also in these offices that BLM has been undertaking land use planning since the 1960's. By 1981, the land use planning process had implemented the requirements of

section 202 of FLPMA and the Bureau's 1979 planning regulations. Thus, the terminations were not made in isolation vis-a-vis the land use planning process but were made in the context of that process.

3. Authority to classify the public lands and to provide for their orderly disposal or retention originated with the passage of the Taylor Grazing Act of 1934. The Taylor Grazing Act authorized the Secretary of the Interior (Secretary), in his discretion, to establish grazing districts or additions thereto and/or modifications and identify vacant, unappropriated, unreserved public domain lands which were chiefly valuable for grazing and raising forage crops, or more suitable for sale, entry, or exchange. Once a grazing district was established under the Act, all forms of entry and settlement except location under the Mining Law of 1872 within the exterior boundaries of the grazing district were barred until the land was classified under Section 7 of the Taylor Grazing Act.

4. In 1936, section 7 of the Taylor Grazing Act was amended to include within the Act's scope lands which were withdrawn by Executive Orders 6910 and 6964 and incorporated the original grazing districts established pursuant to the Taylor Grazing Act. As amended, section 7 provided that all lands (virtually all the remaining vacant, unreserved and unappropriated public domain lands outside of Alaska) covered by the Act should not be subject to disposition sale or location except under the Mining Law of 1872 unless, and until, the lands were classified and opened to disposal.

5. In 1964, Congress passed the Classification and Multiple Use Act (C&MU Act), 78 Stat. 986, which provided temporary authority to the Secretary to review and classify lands for retention for interim, multiple use management, and to dispose of land meeting certain criteria. This Act expired in 1970. Hence, a new concept

of retention, albeit temporary, or interim, was introduced in relation to management of the nation's public lands. BLM thereafter began the implementation of the review and classification actions contemplated by the C&MU Act. A report published in June of 1970 recognized that BLM had acted under a congressional mandate to make their determinations as soon as possible due to the temporary duration of the Act. See *One Third of the Nation's Land, A Report to the President and the Congress*, at p. 53. Exhibit 2 to Edwards' IC affidavit.

6. A number of statutes authorized the Secretary to dispose and/or use the public lands, e.g., the Small Tract Act, the Isolated Tract Act (Revised Statute 2455), the Recreation and Public Purposes Act (R&PP Act), the Homestead Act, Section 8 of the Taylor Grazing Act, the Mining Law of 1872, Mineral Leasing Act, and the Desert Land Act. Withdrawals segregated the lands from the effect of some or all of these public land and mineral laws. All these statutes except the Desert Land Act, the R&PP Act, and the Mining Law of 1872 were repealed by FLPMA in 1976. A review of some of those statutes follows:

A. The Small Tract Act, 43 U.S.C. 682a (1964 Ed.) was enacted in 1938 and authorized the Secretary to classify lands chiefly valuable for recreation, residential, business or community purposes and to sell or lease such lands at his discretion for up to five acre tracts to eligible individuals and organizations meeting the Act's requirements. The Small Tract Act was repealed by section 703 of FLPMA.

B. The Isolated Tract Act, 43 U.S.C. 1171, (Revised Statute 2455) was originally enacted in 1895 and was amended on several occasions. It authorized the Secretary to sell tracts of isolated or disconnected

public domain lands not exceeding 1,520 acres at public auction to the highest bidder. The Act also authorized the Secretary to sell lands too rough or mountainous for cultivation, not to exceed 760 acres, to the highest bidder, even if such tracts were not disconnected or isolated within the meaning of the Act. The Isolated Tract Act was repealed by section 702 of FLPMA.

C. Section 8 of the Taylor Grazing Act, 43 U.S.C. § 315(q) authorized the Secretary of the Interior to accept title to privately owned or state lands within or outside the boundaries of a grazing district. Upon receipt of such land and in exchange thereof, the Secretary was authorized to issue a patent to lands located within a surveyed grazing district or unsurveyed surveyed public land equal to, but not in excess of, the acreage of the lands received. However, states were prohibited from selecting lands within a grazing district unless the lands being offered by the state were within a grazing district. Nonetheless, once a state made an application for an exchange under the Act, BLM was required to "proceed with [the] exchange at the earliest possible date and to cooperate fully with the state. . . ." 43 U.S.C. § 315(g)(c). Hence, in order to prevent such exchanges, BLM classified land for multiple use management and segregated them from the operation of section 8 of the Taylor Grazing Act. Section 8 was repealed by FLPMA. Section 705.

D. The Public Land Sale Act of 1964, 48 U.S.C. §§ 1921-27, gave the Secretary temporary authority to sell lands classified for disposal which were found chiefly valuable for (a) the orderly growth and development of a community, or (b) needed for commercial, agricultural (excluding lands capable of raising

forage crops and grazing) or industrial use. The size of a tract could not exceed 5,180 acres and had to be sold through competitive bidding at not less than the appraised fair market value. The Public Land Sales Act expired by its own terms on June 30, 1969.

E. The Desert Land Act of 1877 (DLE), 43 U.S.C. 321, *et seq.*, as amended, was designed to promote the reclamation, by irrigation, of the arid and semi-arid public lands of the west. The Act authorized the Secretary to accept declarations from individuals intending to reclaim tracts of desert land not in excess of 320 acres. Upon allowance, entrymen were given four years to make proof of reclamation to receive patents. Before entries were permitted, the Secretary had to determine that the lands were incapable of producing any agricultural crops without irrigation. The DLE was not repealed by FLPMA and remains in effect. Currently, only Idaho and Nevada have significant numbers of DLE applications. Moreover, of the applications received, less than 1% of the lands involved have been found suitable for entry.

F. The Recreation and Public Purposes Act of 1926, as amended, authorized the Secretary to classify lands for disposal to states, counties, territories, municipalities, their political subdivisions, and non-profit organizations for any recreational or public purposes. If no application was received by BLM within 18 months after the issuance of the classification notice, the segregative effect of the R&PP classification was automatically vacated and the public lands returned to their former status. See 43 C.F.R. § 2741.6. The R&PP Act was not repealed by FLPMA.

G. 25 U.S.C. § 339, as amended, commonly referred to as the Indian General Allotment Act, was

originally enacted in 1887. This Act permits Indians or Tribes not living within the boundaries of a reservation to settle upon unappropriated public land and apply for a patent to such lands in the same quantity and manner as provided for Indians residing upon reservation by the Act of February 8, 1887, ch. 119, § 1. 84 Stat. 388, as amended. This act was nondiscretionary in that BLM was required to convey patents to qualified applicants. The Indian General Allotment Act was not repealed by FLPMA.

H. The Homestead Act, 43 U.S.C. (6), *et seq.*, permitted citizens of the United States to enter in good faith not more than one-quarter section (160 acres) of unappropriated public land and file an application to receive a patent if the entry was made for the purpose of settlement and cultivation. To prevent alienation of the government's title, BLM classified millions of acres of land against appropriation under the Homestead Act. This Act was repealed by Section 702 of FLPMA.

7. By 1976, BLM had classified approximately 180,000,000 acres of lands under a variety of statutes. The vast majority of classifications were made pursuant to the C&MU Act (over 177,000,000 acres). Many of these lands were classified for retention to allow Congress an opportunity to determine how the public lands were to be utilized. When FLPMA was enacted, it provided that public lands were to be retained in Federal ownership and managed for multiple use and sustained yield unless it was determined that disposal of such lands was in the national interest. FLPMA made the C&MU retention classifications obsolete and unnecessary. Termination of these types of classifications are hereinafter referred to as Criterion A terminations.

8. One of the objectives of FLPMA was to "[w]eed out of the body of law those statutes and parts of statutes which are obsolete." See H.R. Rep. No. 1163, 94th Cong. 2d Sess. 2 (1976). At the time FLPMA was enacted, over 3,000 public land laws existed. FLPMA repealed either entirely or a portion of 253 public land laws relating to homesteads, agricultural entry, small tracts, drainage, military abandonment and sales and disposals. Approximately 125,000,000 acres of the public lands were classified or segregated against laws which no longer exist. Terminations that ended these types of classifications are hereinafter referred to as Criterion B terminations.

9. After FLPMA was enacted, BLM developed more sophisticated land use planning techniques which, *inter alia*, took into account the need to retain lands in Federal ownership and to prevent unwarranted applications under the remaining land disposal laws. Such action rendered the old classifications unnecessary. Hence, classifications that segregated against the operation of one or more public land disposal laws and where a land use plan was completed, were terminated. Terminations that ended these types of classifications are hereinafter referred to as Criterion C terminations.

10. Some classifications had segregated land against the operation of the mining laws. In many instances, such lands had only nominal mineral value and no serious interests had ever been expressed regarding mining. Prior to being segregated, these lands had always been open to mining, but very few claims, if any, had been located, and even fewer acres were ever actually disturbed. A few classifications that segregated public lands against mining where the lands contained only nominal mineral value and where no serious interest for mining existed were terminated. Termination that ended these types of classifications are hereinafter referred to as Criterion D terminations.

11. The four criteria described above, were developed by the Bureau in the late 1970's and 1980. They were defined as criteria to be used by the Bureau Field Offices in terminating classifications and were given as written instructions by the Washington office to its state offices in OAD 81-11 issued in 1981. See Exhibit 8 to Edwards' 1C Affidavit. These criteria were later restated in BLM Manual 2355. See Exhibit 21 to Edwards' 1B Affidavit. Both OAD 81-11 and the BLM Manual 2355 stated that classifications may be terminated if they met any of the four criteria noted—above namely, lands had been classified for retention only (Criterion A), the statutes against which the classifications had segregated the lands had been repealed (Criterion B), the lands had been segregated against discretionary land laws and a land use plan was in place (Criterion C), and lands had been segregated from mining and where there was only nominal mineral value and no serious interest had been expressed with regard to mining activities. (Criterion D).

12. In employing these criteria, the Bureau has terminated 617 classifications covering 153,975,381 acres since January 1, 1981. Nearly 7,000,000 acres, following the review thereof, were not terminated and/or modified but were retained. See Edwards' 1C Affidavit at ¶ 19. I am unaware of any classifications that were terminated that restored land to uses that are inconsistent with approved land use plans in effect at the time the classification was terminated or subsequently developed. The totals by the criteria identified above are as follows:<sup>1</sup>

<sup>1</sup> The classification order totals reflected herein have been calculated on the following basis: if they were terminated using more than one criterion, they have been counted only once and only in the criterion where the greatest amount of acreage appears.

A. Criterion A—Two classifications were terminated covering a total of 5,264 acres. They were both in the State of Arizona.

B. Criterion B—The vast majority of the terminations, both in number of classifications terminated and the acreage involved fall within this category. Of the total 617 classifications terminated, 516 are within this category (laws repealed by Congress). Of the 155,975,381 acres on which classifications had been terminated, 118,775,142 are within this category.

C. Criterion C—Sixty-seven classification orders were terminated in this category which covered a total of 2,359,820 acres.

D. Criterion D—Twenty-four classifications were terminated in this category covering a total of 210,155 acres. See Exhibits 1-12.<sup>2</sup>

13. The individual terminations by state within each of these criteria are attached as exhibits 2-12 to this declaration. The fact that classifications were terminated in criterion A, B or D does not mean that no land use plan had been completed or were in place at the time of the termination. The breakdown only indicates the specific criteria employed by the BLM in terminating the classification by the criteria set forth and described above.

14. An analysis of the terminations by criterion in each state is as follows:

A. In Criterion A, only two classifications were terminated as noted in ¶ 12A, *supra*. Both of these

<sup>2</sup> The figures in Exhibits 1-12 were derived from the Classification Orders and supporting case files of the BLM. Every effort has been made to make them as correct as possible. However, we are continuing to review these statistics and, if necessary, we will file an errata sheet showing any corrections that are made in view of our ongoing review.

classifications were in Arizona and covered 5,264 acres. These lands had been classified for retention and multiple use management. They segregated the lands from all forms of appropriation, including the Mining and Mineral Leasing Laws. Section 102 of FLPMA mandates that all public lands be retained and managed for multiple use and sustained yield. Thus, these retention classifications became superfluous as they had been replaced by Section 102(a)(1) of FLPMA. Therefore, termination of these two classifications was completed.

B. In Criterion B, a total of 516 classifications covering 118,775,142 acres were terminated. The following is a state-by-state breakdown and description of the effects of Criterion B terminations for each state. The rationale behind Criterion B terminations was that the classifications segregated the land from the effect of laws which FLPMA subsequently repealed. Hence, the classification became superfluous. For example, many classifications segregated lands from appropriation under the Homestead laws. Thereafter, Congress repealed the Homestead laws. Thus, the classifications had been rendered moot by Congress.

(1) *Arizona*—26 classification orders on 10,484,587 acres were terminated since January 1, 1981. These classifications segregated the lands from appropriation under the agricultural entry laws (or used in his declaration [*sic*], to "agricultural entry laws, refers to the Homestead Acts, the Indian General Allotment Act, and to Desert Land Act), sales under RS 2455 and the Public Land Sales Act of 1964. However, the lands had remained open during the term of the

classifications to all other public land laws including the mining and mineral leasing laws. FLPMA repealed all the aforementioned laws with the exception of the Desert Land Act, making the classifications superfluous.

(2) *Montana*—31 classification orders on 5,194,094 acres were terminated since January 1, 1981. These classifications primarily segregated the lands from appropriation under the agricultural entry laws, sales under RS 2455, and the Public Land Sales Act of 1964. The lands had remained open to appropriation under all remaining public land laws including the mining and mineral leasing laws. FLPMA repealed the authorities against which the lands had been classified, thus making the classifications totally unnecessary. Hence, they were terminated.

(3) *California*—206 classification orders on 165,435 acres were terminated since January 1, 1981. 52,232 acres of the total had been classified for disposal under the Small Tract Act and the remainder had been classified for disposal under RS 2455. FLPMA repealed RS 2455 and the Small Tract Act and, hence, the classifications became moot.

(4) *Washington*—3 classification orders on 1,418 acres of lands were terminated since January 1, 1981. These lands were classified for lease or sale for home site purposes under the Small Tract Act. When the Small Tract Act was repealed by FLPMA, making the classification no longer applicable, the classifications were terminated.

(5) *Wyoming*—20 classification orders on 12,698,007 acres of land were terminated. Two

classifications segregated 4,743 acres from appropriation under all the public land laws including the Mining Law but not the Mineral Leasing Act, and were designated for exchange under section 8 of the Taylor Grazing Act. However, Section 8 was repealed when FLPMA was passed, thus making these classifications moot. Four classification orders on 180 acres were classified for disposal under the Small Tract Act. The Small Tract Act was also repealed by FLPMA, thus making these classifications moot. The remaining 14 classifications were made under the C&MU Act classified the lands for multiple use management and classified them for appropriation under the agricultural land laws and from sales under RS 2455. For the laws that were repealed by FLPMA, these classifications had become moot.

(6) *New Mexico*—11 classification orders on 8,744,336 acres were terminated since January 1, 1981. These classifications segregated the lands from appropriation under RS 2455 and agricultural entry laws but not from the mining and mineral leasing laws. For the laws that were repealed by FLPMA, these classifications had become moot.

(7) *Utah*—25 classification orders on 22,837,632 acres were terminated since January 1, 1981. These lands had been classified for multiple use management and segregated from appropriation under the agricultural entry laws, and sales under RS 2455. In addition to being segregated from the agricultural entry laws and sales under RS 2455, some orders also segregated the lands from exchanges under section 8 of the

Taylor Grazing Act. For the laws that were repealed by FLPMA, these classifications became moot.

(8) *Colorado*—32 R&PP classification orders totalling 6,503,885 acres were terminated since January 1, 1981. Under the terms of the classifications, the lands were only opened to appropriation under the Mineral Leasing Act and for disposal under the R&PP Act. Since no applications to obtain these lands were received within 18 months of the date the lands were classified by a qualified applicant, the classifications were automatically vacated. Subsequent termination of these classifications was appropriate since no application could be accepted upon expiration of the 18-month deadline.

(9) *Idaho*—23 classification orders totalling 5,093,369 acres were terminated since January 1, 1981. 22 classification orders on 5,076,215 acres were segregated from the agricultural entry laws and sales under RS 2455. One classification on 17,154 acres was terminated which, in addition to segregating the lands from agricultural entry and sales, also classified the land for sale under the Public Sale Act of 1964 and exchanges under section 8 of the Taylor Grazing Act. All of the aforementioned lands were classified for multiple use management and were not segregated from any other public land laws, including the Mining and Mineral Leasing Law. For the laws FLPMA repealed, these classifications became moot.

(10) *Oregon*—54 classification orders on 9,309,559 acres were terminated since January 1, 1981. These classifications segregated the lands

from appropriation under the agricultural entry laws and sales under RS 2455. The lands were classified for multiple use management and subject to appropriation under all remaining public land laws, including the Mining and Mineral Leasing Laws. Again, for the laws FLPMA repealed, these classifications became moot.

(11) *Nevada*—85 classification orders on 37,742,820 acres were terminated since January 1, 1981. 44 orders had classified 68,166 acres for disposal under the Small Tract Act. 18 orders classified 5,952 acres for exchange under Section 8 of the Taylor Grazing Act. Six orders classified 438 acres for disposal under the Public Land Sales Act and one order classified 48 acres for sale under RS 2455. The aforementioned classifications segregated the lands from all forms of appropriation under the public land laws with the exception of the Mineral Leasing Law. The remaining orders classified land for retention and multiple use management and segregated them from agriculture entry and sales under RS 2455 but kept them open to all other forms of appropriation including the Mining and Mineral Leasing Laws. For the laws FLPMA repealed, these classifications became moot.

C. With regard to classifications terminated pursuant to Criterion C, 67 classifications covering 2,359,820 acres have been terminated since January 1, 1981. These classifications were terminated because they segregated the lands from the operation of the discretionary public land laws and termination was consistent with an approved land use plan. Exhibits 2-13 list the terminations in Criteria C for each State.

The following state-by-state breakdown is not meant to be inclusive, but is intended to illustrate the typical effect of terminating classifications which segregated the land from the operation of one or more discretionary land laws with an approved land use plan in place.

(1) *Arizona*—Four classifications on 41,613 acres were terminated since January 1, 1981. For example, A-5882 terminated a classification covering 14,281 acres which had segregated the lands from all forms of appropriation including mining and mineral leasing. These lands were classified for transfer out of federal ownership under Arizona state indemnity in-lieu selection rights.

A-4184 also segregated the land from all forms of appropriation including mining and mineral leasing and classified the lands for transfer from federal ownership under Arizona state indemnity in-lieu selection rights.

(2) *California*—Forty-two classifications covering 2,242,045 acres were terminated since January 1, 1981. For example, R-697 segregated 473,964 acres from appropriation under the agricultural entry laws and sales under RS 2455. These lands were open to all other forms of appropriation and were classified for multiple use management under the Classification and Multiple Use Act. In addition, 3,810 acres were also segregated from mining but remained open to mineral leasing.

S-2577 segregated 2,920 acres for appropriation under the agricultural land laws and sales under RS 2455. In addition, 3,680 acres were

segregated from mining but remained open to mineral leasing. These lands were also classified for multiple use management and were subject to appropriation under the remaining public land laws.

S-965 segregated 169,166 acres from appropriation under the agricultural land laws and sales under RS 2455. In addition, 1,599 acres were segregated from mining but remained open to mineral leasing. These lands were classified for multiple use management and were subject to appropriation under the remaining public land laws.

R-2821 segregated 178,726 acres from appropriation under the agricultural land laws and sales under RS 2455. This was a partial termination of a classification which retained the segregation from mining on 11,341 acres. The partial termination was done because these lands which were closed to mining were located throughout several sites and used primarily for recreation; Westwell Archaeological site, Whipple Mountain Recreation and Natural Area, and the Picacho Recreation and Wildlife Area. The segregative effect against mining on the 11,341 acres were retained until a withdrawal application can be processed.

R-1390 segregated 223,397 acres from appropriation under the agricultural land laws and sales under RS 2455. It also segregated 13,556 acres from mining but remained open to mineral leasing. However, 9,216 acres remained closed to mining because these lands were located throughout several sites and used for recreational pur-

poses; Mecca Hills Recreation Area and the Coyote Spring Wildlife Area.

In those examples and in every classification terminated in California, a land use plan covering the lands was in place.

(3) *Idaho*—One part of a classification (listed under Criterion B) covering 205 acres was terminated since January 1, 1981. These lands were classified for exchange under Section 8 of the Taylor Grazing Act, for lease or sale under the R&PP Act, sales under RS 2455 and sale under the Unintentional Trespass Act. These lands were segregated from all other forms of appropriation including the mining and mineral leasing law.

(4) *Montana*—Three classifications covering 10,484 acres were terminated since January 1, 1981. For example, M-10577 terminated a classification covering 520 acres which segregated the lands from appropriation under the agricultural land laws and sales under RS 2455. The lands were classified for multiple use management.

M-15352 terminated classifications covering 1,382 acres which segregated the lands from appropriation under the agricultural land laws and sales under RS 2455. In addition, the lands were also segregated from lease or sale under the R&PP Act. These lands were also classified for multiple use management.

(5) *Oregon*—Nine classifications covering 465 acres were terminated since January 1, 1981. For example, OR-09913 segregated 134 acres from all forms of appropriation under the public land laws, except for lease and sale under the

R&PP Act. These lands were classified for recreation and public purposes.

OR-6113 segregated 72 acres from all forms of appropriation under the public land laws, including mining and mineral leasing, except sales and leases under the R&PP Act. These lands were classified for recreation and public purposes.

(6) *Nevada*—Seven classifications covering 36,313 acres were terminated since January 1, 1981. For example, N-1005A classified 31,260 acres for multiple use management. 13,940 acres were segregated from all forms of appropriation, except disposals under the R&PP Act. These lands were closed to mining, but remained open to mineral leasing. 17,323 acres were segregated from disposal under the public land laws but remained subject to appropriation of the R&PP Act and the mining and mineral leasing law.

N-892A classified 2,250 acres for multiple use management. 1,610 acres were segregated from disposal under all public land laws except the R&PP Act and the mineral leasing law. These lands were also closed to mining. 640 acres were segregated from all forms of appropriation under public land laws except for disposals under the R&PP Act and mining and mineral leasing laws.

N-045724 classified 80 acres for disposal under the Desert Land Entry Act, but these lands remained subject to all forms of appropriation, including the mining and mineral leasing laws.

(7) *Washington*—Two classifications covering 28,695 acres were terminated since January 1, 1981. These lands were classified for multiple use

management and were segregated from agricultural entry and sales under RS 2455. They remained open to all other forms of appropriation, including the mining and mineral leasing law.

No classifications in Criterion C were terminated in Colorado, New Mexico, Utah and Wyoming.

D. Using Criteria D, 24 classifications covering 210,155 acres were terminated since January 1, 1981. The terminations using Criterion D involved classifications that had segregated lands of nominal mineral value from entry under the mining laws. As stated earlier, little interest was expressed to have these lands open to mineral development.

Exhibits 2-12 identifies terminations using criterion D for each state. The following individual state-by-state breakdowns highlights these terminations.

(1) *Arizona*—One classification covering 8,219 acres was terminated since January 1, 1981. A-1351 terminated a multiple use classification which prevented appropriation under both the mining and mineral leasing laws.

(2) *Colorado*—Parts of 6 classifications (listed in Criterion B), covering 2,679 acres were terminated since January 1, 1981. For example, C-3357 terminated a multiple use classification on 1,653 acres. This land was segregated from appropriation under the mining law, but remained open to mineral leasing.

(3) *Montana*—Three classifications covering 43,666 acres were terminated since January 1, 1981. For example, M-7991 terminated a classification on 14,271 acres which were classified for multiple use management and segregated from

mining but open to location under the mineral leasing law.

(4) *Oregon*—One classification covering 2,370 acres was terminated since January 1, 1981. OR-437 terminated a multiple use classification on 19,271 acres which were classified for multiple use management and segregated from mining. However, these lands were never closed to mineral leasing and were subject to appropriation under that law.

(5) *Utah*—Parts of six classifications (listed in Criterion B), covering 132,343 acres were terminated since January 1, 1981. U-2923 terminated 151 acres of a multiple use classification which segregated the land from mining, but not mineral leasing. U-8131 terminated 2,550 acres of a multiple use classification which closed the lands to mining but not mineral leasing. U-6047 terminated 242 acres of a multiple use classification which closed the lands to mining but not mineral leasing.

(6) *Washington*—Seven classifications covering 7,702 acres were terminated since January 1, 1981. OR-5430 terminated 5,099 acres of a disposal classification which designated these lands for disposal under Section 8 of the Taylor Grazing Act, the Public Land Sale Act of 1964, sales under RS-2455, and sale and lease under the R&PP Act. This classification segregated the land from the operation of the mining law, but did not segregate them from appropriation under the mineral leasing law. OR-6353 terminated 1,274 acres of a disposal classification which designated these lands for disposal through exchange under Section 8 of the Taylor Grazing

Act. This classification segregated the land from all other forms of appropriation, including the mining law. They were, however, subject to appropriation under the mineral leasing law.

(7) *Wyoming*—Twelve classifications covering 13,176 acres were terminated since January 1, 1981. For example, W-022567 terminated 5,614 acres of a multiple use classification which had closed the lands to mining but not mineral leasing. Similarly, W-0200621 terminated 4,197 acres of a multiple use classification which closed the lands to mining but not to mineral leasing. W-0304203 terminated R&PP Act classification which closed the lands to all forms of appropriation, including mining and mineral leasing.

California, Idaho, New Mexico, and Nevada had no terminations using Criterion D.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Sept. 5, 1986

Date

/s/ VINCENT J. HECKER

Vincent J. Hecker

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil No. 85-2238

NATIONAL WILDLIFE FEDERATION, PLAINTIFF

v.

ROBERT F. BURFORD, DONALD P. HODEL, AND THE UNITED  
STATES DEPARTMENT OF THE INTERIOR, DEFENDANTS

DECLARATION OF DAVID C. WILLIAMS

1. I, DAVID C. WILLIAMS, Chief, Division of Planning and Environmental Coordination, Bureau of Land Management (BLM), United States Department of the Interior, Washington, D.C., hereby declare under penalty of perjury that the information contained in this affidavit is true and accurate to the best of my knowledge. Some of the details in this declaration have been supplied by BLM planning specialists and other sources within BLM.

2. The purpose of this declaration is to describe briefly: (1) the history of formal land use planning for the BLM-managed public lands; (2) the types of land use plans that have been—and are being—used by BLM; and (3) how these plans relate to the planning principles of section 202 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1712.

HISTORY

3. Throughout the two hundred year history of the Nation's public lands, the dominant policy of the United States toward those lands has been one of disposal out of

federal ownership and into state or private control. Only within the last twenty years or so has there emerged a firm policy of retention and disposal. This shift in policy has resulted in a multiple use management—planning philosophy with respect to the public lands remaining in BLM's custody.

4. Formal land use planning was first introduced within BLM during the 1960's. Planning was focused on program activities at the BLM district level.<sup>1</sup> Functional land use development plans covering each major land use program (e.g., livestock grazing, wildlife habitat, recreation, timber, minerals) were called for. However, these plans did not produce a coordinated, long-range, multiple-use management framework for decisionmaking. To remedy this, a new planning system, centered on smaller "planning units", was introduced. The plans developed out of this new system were called Management Framework Plans (MFPs).

5. Work on the first MFPs was started in 1969. Five prototype plans were developed and, from the lessons learned in this experimental process, coupled with experience gained during subsequently developed MFPs, extensive revisions in the planning system were implemented in 1975 through the BLM manual. The revisions served to strengthen the relationships between planning decisions and the analysis of resource information including environmental concerns and social-economic data. Many of the MFPs in use today were prepared using this 1975 manualized guidance. By 1979, approximately 80 percent of the

<sup>1</sup> BLM management activities have been implemented largely through a basic administrative subdivision called the resource area. Two or more such areas comprise a district, and within each of the western states there are a number of BLM districts. The districts in each state are supervised by a BLM State Director.

BLM-managed lands in the contiguous western states had been included in MFPs.

6. The BLM planning system, as it evolved in the late 1960's and early 1970's was not driven by statute. BLM recognized the need for planning to resolve land use conflicts and to allocate limited resources. Without statutory requirement, BLM developed the MFP process to meet those needs. BLM received funding for, and thus implicit approval of, the MFPs from the Congress.

7. In section 202 of FLPMA, Congress specified by statute for the first time a number of planning principles to be observed by BLM in the development and revision of its land use plans. Moreover, existing MFPs were to be reviewed to ensure that each plan complied with the principles prescribed in section 202. Also, Interior was directed to issue regulations affording to the public opportunities for participation in the planning process.

8. Early in 1977, work was commenced to implement rulemaking for section 202. Discussion packages containing draft regulations were made available to the public and a *Federal Register* notice of intent to propose rulemaking was published in March of 1978. 43 C.F.R. 8814 (March 3, 1978). Comments on the draft regulations were received from 130 sources. In December of 1978 proposed rulemaking was published. 43 F.R. 58764 (December 15, 1978). Again, numerous comments and suggestions were received. On September 6, 1979, the final rules took effect. 44 F.R. 46386 (August 7, 1979). As adopted, the rules:

- introduced a revamped planning system, incorporating the principles prescribed by section 202 of FLPMA;
- called for Resource Management Plans (RMPs), keyed to BLM resource areas and designed to even-

tually replace the MFPs over an indeterminate period of time designated as the "transition period";

- preserved MFPs until superseded by RMPs, but only if the MFPs complied with the "principles of multiple use and sustained yield and shall have been developed with public participation and governmental coordination. . . ." 43 C.F.R. 1601.8(b)(1) (1979).

The purpose of section 1601.8(b)(1), which in 1983 was renumbered as 1610.8(a)(1),<sup>2</sup> is to secure MFP compliance during the transition period with the statutory requirements for BLM land use plans as mandated by section 202 of FLPMA. Thus, each MFP must be considered separately to determine its validity in relation to section 202 planning principles.

9. In October of 1979, six pilot RMP planning projects were inaugurated under the new BLM regulations. These projects were used to gain practical experience in operating under the regulations and to translate this experience into a bureau-wide implementation strategy. On the strength of this experience, 21 RMPs were started in the fall of 1980. To date, about 70 RMPs, out of an expected total of from 140 to 150 RMPs have been started, and 25 RMPs have been approved and are in operation. The average planning area covers approximately 1,000,000 acres of public land. BLM requires about two and one-half to three years of interdisciplinary effort to produce an RMP at a cost of about \$450,000. In some cases, plans have exceeded \$1,000,000 in cost. BLM's annual budget expenditures for land use planning dropped from a Fiscal Year 1981 high of almost \$15,000,000 to \$9,047,000 in Fiscal Year 1986. Because of the budget cutbacks and expected future reductions, the availability of skilled special-

<sup>2</sup>48 F.R. 20364, 20375 (May 5, 1983).

ists needed to prepare the plans has been substantially curtailed. It is estimated that at current budget rates and reduced manpower levels, the process of phasing in the RMPs cannot be completed before 1996, assuming BLM prepares RMPs at a level rate and abandons its policy of preparing new RMPs only as they are needed to address management issues or replace outmoded MFPs.

#### PRE-FLPMA PLANNING

10. MFPs provided BLM with a highly detailed planning base for making land use decisions and allocating resources in the context of multiple-use management. The 1975 BLM manual defined an MFP as a planning decision document establishing for a given public land area, land use allocations, coordination guidelines for multiple use, and objectives to be achieved for each class of land use or protection.

11. The MFPs were, in practice, very detailed and complex sets of documents requiring significant amounts of data, analysis, and public participation. The MFP incorporated an interdisciplinary approach to planning and, where appropriate, addressed each of the following resource and support programs: Lands, Minerals, Forestry, Range, Watershed, Wildlife, Recreation, Cadastral Survey, Fire Protection, Roads and Trails, Buildings and Yards, Access/Transportation/Rights-of-Way, and General Administration. In addition, the MFP process was designed to include in the development of land use plans such principles as issue identification, inventory of resources, public participation, social-economic assessment, environmental impact analysis, conflict resolution, and coordination with affected federal, state, and local agencies. Paragraphs 12-18 outline the steps called for in the 1975 BLM manual to ensure the effective use of these principles.

12. A *pre-planning analysis* was prepared for each MFP planning unit to identify issues to be addressed, level of planning detail, inventory needs, scheduling requirements, and dollar and personnel resources needed to complete the plan. The planning team reviewed national level policy guidance and general criteria, as set out in the BLM manual and other relevant documents.

13. Concurrently, the planning team prepared a *public participation plan* to identify interested and affected publics, develop a strategy for obtaining input throughout the planning process, and for communicating decisions once they had been made. Appendix 2 to the 1975 BLM manual, section 1601, Public Participation in the Planning Process, provided extensive guidance on how BLM's planning teams might effectively implement the public participation plans and solicit public input into MFPs and related planning documents. In actual practice, public participation was most often solicited through notices, brochures, mailouts, field tours, open houses, public meetings, formal hearings, and individual contacts with numerous individuals, groups, organizations, public land users, and state and local government agencies. Typically, BLM would begin soliciting input before the formal planning process was begun and would continue throughout the process until after the planning decisions had been made.

14. Early in the planning process, a *social-economic profile* (SEP) was prepared for the state or region of which the planning area was a part. The SEP analyzed major social and economic trends and issues. Also, it described governmental infrastructures that impacted the management of public lands and associated resources. Additionally, the document set forth BLM's relationship with other planning and land use control groups and listed agencies, groups, and individuals who might need to be consulted

during the development and implementation of the land use plan. The SEP was to be used as a tool by the planning team in preparing other portions of the plan.

15. Before BLM prepared its planning recommendations in the MFP, it undertook a comprehensive collection and analysis of resource data for each of the programs listed above in paragraph 11. This crucial process took place in four steps in what BLM called a *Unit Resource Analysis* (URA). Step 1 entailed preparation of a *base map* displaying planning area boundaries and landownership status to facilitate the recording of resource data later in the development of the plan. Step 2 consisted of an in-depth *physical profile* or description of resource elements, including climate, topography, geology and soils, vegetation, water resources, animals, fire, limiting factors, and developments. Step 3 involved the description and analysis of the *present situation* for each major resource category, including evaluations of current use, production, trends, conflicts, and resource quality. Concurrently, an *ecological profile* was prepared that analyzed ecological conditions and interrelationships in the planning area. In Step 4, BLM analyzed all feasible *management opportunities* for each resource category and examined options for improving ecological quality. The last three steps entailed extensive consultation with various publics and user groups and often were preceded by inventories to gather data needed for the analysis. The 1975 BLM manual called for extensive narratives and graphic overlays to document the descriptions and analyses. Typically, a completed URA would consist of several volumes of data and as many as 100-150 large, mylar overlays to be used in conjunction with the base map. The URA provides an extremely valuable source of information, not only for BLM resource specialists involved in the development and imple-

mentation of the MFP, but for state, regional, and local land use planning agencies which rely heavily on the information.

16. Data and analyses provided by the URA and SEP were then used by the BLM planning team to prepare a *Planning Area Analysis* (PAA). Among other things, the PAA analyzed the significance of public lands and resources to users and institutions in the vicinity, developed demand projections for public lands and resources in the planning area, and analyzed the significance of "critical environmental areas" as defined by state or federal law. The PAA was intended to facilitate development of resource objectives and recommendations in the MFP and to help evaluate the significance of various conflicts during the multiple use analysis.

17. Following completion of the URA and PAA, BLM planning teams began preparation of the MFP. The planning team drew upon all of the previous analyses and solicited public participation in the development of planning objectives and recommendations. An MFP was completed in three steps. During Step 1, each resource specialist developed *objectives* to be reached for a particular resource program and made specific *recommendations* as to how each objective was to be achieved. The recommendations were to reflect BLM policy and were to be responsive to social, economic, and environmental needs. At Step 2, the responsible BLM manager conducted the *Multiple Use Analysis* which entailed an analysis of impacts of the Step 1 recommendations and identification of conflicts between various resource programs. In conducting this analysis, the BLM manager was to consider the respective values of the resources involved, the magnitude of the impacts, and the significance of values that would be gained or lost. The BLM manager then reconciled conflicting recommendations and, where appropriate, considered alternatives to

reaching the objectives identified in Step 1. The manager's decisions became the multiple use recommendations.

18. Step 3 of the MFP was completed by the appropriate BLM District Manager who decided whether to accept, reject, or modify the multiple use recommendations made in Step 2. Summaries of the MFP Step 3 decisions were commonly prepared and sent to persons who had participated in the planning process and other interested parties. Decisions on certain resource programs, such as livestock grazing, might be deferred until completion of programmatic environmental impact statements where such were required. Although compliance with sections 102(2)(A) and (B) of the National Environmental Policy Act (NEPA), 42 U.S.C. 4332(2)(A) and (B), was generally accomplished throughout the planning process, specific compliance with section 102(2)(C) was generally reserved until specific planning recommendations were proposed for implementation.<sup>3</sup>

19. MFPs were very detailed and assessed virtually all resource programs found within the planning area. Nonetheless, implementation of planning decisions for certain activities required more specific analysis and coordination with public land users and affected publics upon approval of the MFP. Such detailed planning was later prepared by individual resource programs. These planning documents, known as *activity plans*, were generally prepared on a site specific basis involving smaller geographic areas. The plans were prepared with public participation and were preceded by NEPA compliance. The intent to prepare ac-

<sup>3</sup> In general, NEPA section 102(2)(A) requires federal agencies to use an interdisciplinary approach in planning and decisionmaking. NEPA section 102(2)(B) requires that consideration be given to unquantified environmental amenities and values in decisionmaking. NEPA section 102(2)(C) requires the preparation of an EIS for major, federal agency actions.

tivity plans was usually cited in the MFP, but plans could be prepared whenever BLM recognized need for them in order to implement an MFP decision. Activity plans were commonly prepared for such resources as wildlife (Habitat Management Plan), wild horses and burros (Herd Management Area Plan), forestry (Timber Management Plan), realty actions (Lands Activity Plan), recreation (Recreation or Wilderness Management Plan), and road maintenance (Transportation Plan).

20. MFPs and related planning documents were, thus, comprehensive in nature and embodied state-of-the-art principles of planning and environmental assessment. Many of the principles, terms, and concepts used or developed in the pre-FLPMA MFP process were incorporated into the planning requirements of FLPMA, section 202, and now provide standards for BLM's current planning process. MFPs prepared in accordance with the relevant BLM manual sections for those plans substantially meet all nine of the planning principles identified in section 202 of FLPMA. Specifically, MFPs: 1) promote the principles of multiple use as set forth in applicable law, (see page 7, Glossary, BLM Manual 1601, release 1-952, 3/6/75; 2) use a systematic interdisciplinary approach in considering physical, biological, economic and other sciences as described in the 1975 BLM Manuals 1601, 1603, 1605, 1607, and 1608; 3) consider the identification and protection of critical environmental areas as generally described in the BLM Manual 1607.5, release 1-959, 3/28/75, and as further provided by specific resource programs in the URA Step 3 and MFP Steps 1, 2, and 3; 4) rely on an inventory of the public lands and their resources as provided in Steps 1 and 2 of the URA; 5) consider present and potential uses of the public lands as provided in Steps 3 and 4 of the URA and Steps 1 and 2 of the MFP;

6) consider relative values of resources involved and alternative means for enhancing those values as provided in URA Step 4 and MFP Step 2; 7) consider long-term and short-term benefits and impacts in MFP Steps 1, 2, and 3; 8) provide for compliance with applicable state and federal pollution laws as described in the PAA and URA Step 3, and through the resource program recommendations of MFP Steps 1, 2, and 3, (see, for example, Watershed, BLM Manual 1608.36, release 1-955, 3/19/75); and 9) provide for extensive coordination with state and local governments and other federal agencies in conducting inventories and developing planning recommendations, taking into account the views of these agencies and giving full consideration to plans and programs developed by them (see Intergovernmental Cooperation in the Planning Process, BLM Manual 1601.8, release 1-952, 3/6/75). Attached as Exhibit 3 is relevant Planning Guidance from the BLM Manual.

#### POST-FLPMA PLANNING

21. After FLPMA was enacted on October 21, 1976, BLM continued to prepare MFPs using the 1975 BLM manual instructions until they were discontinued substantially on February 2, 1983. After the planning regulations became operative in 1979, the 1975 instructions were used with the regulations in the blending process for transition MFPs, as described in paragraph 24.

22. As stated above in paragraph 8, the planning regulations for section 202 of FLPMA became effective on September 6, 1979. The regulations were issued primarily to respond to the public participation requirements of FLPMA in connection with the planning process. As they evolved, the regulations closely followed the rulemaking for land use plans applicable to National Forest System

lands. This was not intended originally. BLM's initial course of action was documented in its draft regulations package of early 1978. In essence, that course provided for the incorporation of the 1975 BLM manual guidance for MFPs into rulemaking. But with greater emphasis on certain principles set out in FLPMA (e.g., giving priority to AOEC designations, consistency with state and local plans) [sic]. Other modifications reflected suggestions by the American Society of Planning and by BLM officials experienced in MFP preparation. However, the essential elements of the MFP process were intended to be preserved. All of this was changed, however, during the proposed rulemaking stage when BLM decided to adopt the nine step planning process as used by the Forest Service in developing its land use plans. This was done to reduce the complexities of the planning process in the public's mind and, consequently, to encourage public participation in the land use planning of the Nation's two largest multiple use land management agencies — BLM and the U.S. Forest Service. Thus, as it turned out, the proposed rulemaking of December 15, 1978, differed materially from BLM's original draft regulations. The changes involved, among other things, establishing a combined planning and NEPA process (an EIS for each land use plan is prepared as the plan is produced), the packaging of each land use plan and EIS into a single document, provisions for administrative review of planning decisions, and using the plans as a basis for unsuitability reviews as called by section 522 of the Surface Mining Control and Reclamation Act, 30 U.S.C. 1272.

23. The new BLM planning regulations also implemented the planning principles set out in section 202 of FLPMA. To ensure full MFP compliance, and to protect an MFP from invalidity claims relative to FLPMA 202 compliance, section 1601.8(b)(1) (1979) was added to the regulations. Also, Instruction Memorandum No. 80-109,

dated November 23, 1979, was issued. It states in part that:

Paragraph 1601.8(b)(1) requires management framework plans to be examined and found satisfactory against a set of prescribed standards before they can be used as a base for decisions. Management framework plans which do not meet the prescribed standards are invalid and may not be used as a basis for management decisions.

Thus, only those MFPs passing the compliance review required by this instruction were to be retained and used during the transition period referenced in the regulations. The 1984 BLM Manual, Section 1618, further amplifies the compliance review requirement for MFPs.

24. The BLM planning regulations provide for not only the use of RMPs but also for the use of MFPs and the completion and use of transition MFPs. As to the latter, the original 1979 regulations provided, at 43 CFR 1601.8(a), that the Director "shall establish those portions of these regulations which are to be used in the completion of those plans, given time and budgetary constraints established through Federal budgets and legally mandated schedules." The BLM Director's determinations relative to this requirement were published in the *Federal Register*. 44 F.R. 69374 (December 3, 1979). The Director identified 88 transition MFPs, all of which were to be completed after September 6, 1979. These MFPs were subdivided into four categories for the purpose of blending their preparation into the new procedures of the planning regulations.

<u>Category</u>	<u>Scheduled Date of Completion</u>
A	FY 80
B	FY 81
C	FY 82
D	FY 83

The planning regulations were phased in differently for each category. Category A transition MFPs, were well advanced by the time the regulations were adopted and, therefore, their development did not follow substantially the new procedures of the regulations. On the other hand, the procedures followed in the preparation of the Category D transition MFPs were more fully governed by new regulations.

25. Interior's policy is to initiate an RMP only when management issues so require. The "transition period" regulations reflect this policy.<sup>4</sup> Also, the regulations provide for MFP amendments during the transition period. MFP amendments, rather than an RMP, are initiated when (1) there is only a single issue, (2) the existing MFP does not adequately address the issue, and (3) preparation of the amendment – when compared to the preparation of an RMP – will be cost effective.

26. The planning regulations mandate public notice and opportunities for public participation at five specific

<sup>4</sup> This policy was stated and restated during the rulemaking process. See, for example: 43 F.R. 58767 (December 15, 1978) (MFPs remain valid until revised, over time, with RMPs. Areas with critical problems come first, while other areas will continue under MFPs for longer periods); 46 F.R. 57448 (November 23, 1981) (To be more responsive to program needs and public understanding, the regulations are being revised so as to permit more readily the existing MFPs to continue to be used until such time as they can be replaced with RMPs).

points in the development process for RMPs. 43 C.F.R. § 1610.2(f). These opportunities for public participation are required as well for all RMP and MFP amendments. As to each transition MFP, the public participation requirements were applied to the balance of the planning process that still had to be completed after the regulations took effect. Before the planning regulations took effect on September 6, 1979, public participation procedures in the planning process followed the 1975 BLM manual guidelines.

27. Attached as Exhibit 1 are copies of maps, prepared by each of the BLM State Offices, showing the areas in the contiguous western states and Alaska that are covered by respectively, MFPs and RMPs. These maps show the areas covered by the 25 RMPs and the 88 MFPs that have become operative since the planning regulations took effect in 1979. The California Desert Conservation Area Plan, completed in 1980 pursuant to FLPMA section 601, 43 U.S.C. 1781, is not displayed.

28. RMPs are developed by the BLM district and resource area managers, using an interdisciplinary team. The RMP process involves nine planning actions:

- Identification of Issues
- Development of Planning Criteria
- Inventory Data and Information Collection
- Analysis of the Management Situation
- Formulation of Alternatives
- Estimation of Effects of Alternatives
- Selection of Preferred Alternative
- Selection [sic] the RMP
- Monitoring and Evaluation

On April 6, 1984, BLM issued manual guidance to the preparation of RMPs. BLM also has distributed to the public a [sic] explanatory brochure entitled *A Guide to Re-*

*source Management Planning on the Public Lands*. This brochure, attached as Exhibit 2, contains a general description of the RMP process, including the nine steps mentioned above, with particular emphasis on the opportunities for public participation.

29. The principal differences between RMPs and MFPs are briefly described below:

(a) *Planning Area*: An RMP would generally cover a larger area than an MFP. In 1975, the public lands were subdivided into about 350 planning units for MFPs. Because RMPs are usually prepared for entire resource areas, it will only require about 150 RMPs to cover completely the remaining public lands in BLM's custody.

(b) *Environmental Impact Statement*: Under the planning regulations, an EIS is prepared as a matter of course for each RMP. By policy and regulation, Interior has determined that the preparation of an RMP is a major federal action significantly affecting the human environment. EISs were prepared during the preparation of MFPs only where required for particular program recommendations or when specific actions were proposed for implementation.

(c) *Plan Consistency*: FLPMA section 202(c)(9) states in part:

Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

The RMP process accommodates this consistency mandate. While MFPs were prepared with inter-governmental coordination, consistency with plans of state and local governments was not strictly required. This requirement was factored into the transition

MFPs after Fiscal Year 1980 as well as into all MFP amendments.

(d) *Areas of Critical Environmental Concern:* Under the RMP procedures, priority is given to the designation and protection of areas of critical environmental concern (ACEC's). Under MFP procedures, ACEC designation was not required nor was special priority assigned. However, certain areas requiring special management were identified as "critical environmental areas."

(e) *Plan document:* The RMP is published and distributed to the public as a single planning document. By comparison, the MFP is a [sic] extensive collection of work sheets, narratives, and maps with overlays which, because of its size and composition, is not subject to widespread distribution. A summary of MFP decisions often was printed as a separate document and distributed.

(f) *Protests:* RMP procedures allow participants to protest provisions of a proposed RMP at the end of the planning process. Protest triggers an administrative review. No protest or administrative review was afforded under the MFP procedures.

As indicated previously, however, MFPs passing BLM compliance determinations are valid land use plans insofar as compliance with the planning principles of FLPMA section 202.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on this 5th day of September, 1986.

/s/ DAVID C. WILLIAMS

David C. Williams

## Supreme Court of the United States

No. 89-640

MANUEL LUJAN, JR.,  
SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

NATIONAL WILDLIFE FEDERATION, ET AL.

ORDER ALLOWING CERTIORARI.  
Filed January 16, 1990.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

January 16, 1990

Justice O'Connor took no part in the consideration or decision of this petition.

No. 89-640

Supreme Court, U.S.

FILED

MAR 2 1990

JOSEPH F. SPANIOLO, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1989

Manuel Lujan, Jr., Secretary of the  
Interior, *et al.*, *Petitioners*,

v.

National Wildlife Federation, *et al.*,  
*Respondents*.

On Writ of Certiorari to the  
United States Court of Appeals  
For the District of Columbia

BRIEF OF *AMICI CURIAE*  
NATIONAL CATTLEMEN'S ASSOCIATION,  
PUBLIC LANDS COUNCIL, AND  
AMERICAN SHEEP INDUSTRY ASSOCIATION,  
IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37 of this Court, *amici curiae* National Cattlemen's Association (NCA), the Public Lands Council (PLC), and the American Sheep Industry Association (ASI) file this *amicus curiae* brief in support of Petitioners. The parties, Petitioners, Secretary Manuel Lujan, Jr., *et al.*, and Respondent, National Wildlife Federation, have consented to this brief and the consent letters are attached. *Amici* urge this Court to reverse the decision of the Court of Appeals for the Circuit of the District of Columbia and to affirm the decision of the District Court dismissing Respondent's case for lack of standing to sue.

INTEREST OF *AMICI CURIAE*

*Amicus curiae* National Cattlemen's Association is a non-profit trade association that speaks on behalf of all segments of the nation's beef cattle industry and represents approximately 230,000 professional cattlemen. NCA provides the industry an organization in which members work together to protect the industry and to solve its problems in the national economy. A number of NCA members graze cattle on federal land under grazing leases or permits.

*Amicus curiae* Public Lands Council is a non-profit organization representing 27,000 members who hold leases and permits to graze sheep and cattle on federal land. PLC represents its members' interests with specific emphasis on federal land matters.

*Amicus curiae* American Sheep Industry Association is a non-profit organization representing 115,000 producers of wool and lamb in legislative and regulatory matters. ASI also promotes marketing efforts with research, education, and communication activities. Many ASI members graze their sheep under authority of federal grazing leases or permits.

*Amici curiae* members graze sheep and cattle on federal land pursuant to grazing leases or permits from the Bureau of Land Management (BLM) or the Forest Service of the Department of Agriculture. *Amici* members also appropriate water pursuant to state law for their ranch operations. NCA, PLC and ASI members work daily with federal agencies and the resources on federal lands. These members build and maintain water projects that provide water for sheep, cattle, and wildlife.

NCA, PLC, and ASI and their members have a stake in the public land use and procedural issues raised in this litigation. For instance, among the more than 1,000 transactions at issue, Respondents challenge revocation of Executive Orders that impose federal control on hundreds of springs and water holes throughout the West. These reservations may conflict with *amici* members' right to use water under state water law.

*Amici* organizations and their members are also affected by the procedural question concerning the specificity of evidence necessary to empower an environmental organization to challenge federal agency

action. The importance of federal lands to many *amici* members' businesses leads to conflicts between agency actions, policies, and programs and the interests of the livestock grazing industry. *Amici* have challenged the agency action and have been required to specifically show that their interests are affected and that they are entitled to bring suit. In other instances, *amici* must intervene to defend agency action against challenges similar to the one before this Court. When appropriate, *amici* have raised issues as to whether environmental groups have specifically shown they have standing. Consistent application of the standing to sue criteria is very important in *amici* efforts to protect their interests in federal land resources and water.

## SUMMARY OF ARGUMENT

1. *Amici* urge this Court to reverse the decision of the Court of Appeals (*National Wildlife Federation v. Burford*, 878 F.2d 422 (D.C. Cir. 1989) hereafter *Burford II*)<sup>1</sup> and to affirm the district court's decision to dismiss the case for lack of standing to sue. *Amici* will only address the inequities and problems that the court of appeals created when it concluded that the district court should have considered the four

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<sup>1</sup> The court of appeals in *National Wildlife Federation v. Burford*, 844 F.2d 889 (D.C. Cir. 1988) (hereafter *Burford I*) upheld the district court's decision to issue a preliminary injunction.

supplemental affidavits and concluded that Respondent established standing to sue.<sup>2</sup>

2. Standing to sue is a threshold question and Respondents were obligated to address it when it was initially raised in the cross-motions for summary judgment, not three years later. The district court reasonably limited its review to the first three affidavits that have had the benefit of rebuttal. It is fundamentally inequitable to permit Respondents who objected to discovery about its claim of injury in fact to later supplement the record.

3. The decision also fails to take into account that throughout the case, defendants raised fundamental questions about the accuracy of Respondent's allegations. In some instances, the affidavits do not accurately portray the impact of the decisions on Respondent's interests. It is inappropriate for these affidavits to be used as the basis of standing when in fact there are real questions as to their sufficiency.

4. The Court of Appeals creates a double standard for challenging government action, the traditional standard for the business community and a more lenient one for the environmental community. No statute or decision of this Court permits an environmental group to resist inquiry into the facts

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<sup>2</sup> *Amici* fully concur in the Petitioners' brief on the merits and have chosen to address this issue in order to avoid duplication as provided in Rule 37 of this Court.

claimed for standing to sue and then file "corrective" affidavits more than two years later.

## ARGUMENT

### I.

#### NOTIONS OF FAIRNESS REQUIRE THE CONCLUSION THAT THE SUPPLEMENTAL STANDING AFFIDAVITS SHOULD NOT HAVE BEEN CONSIDERED

Notions of fairness and estoppel require that the supplemental affidavits not be considered in finding that Respondents proved their standing to sue.

This case concerns the evidence necessary for an environmental organization to establish injury in fact, the first component of standing to sue.<sup>3</sup> The question is whether the Respondents by affidavit established that at least one member had standing to sue.

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<sup>3</sup> Standing to sue is often articulated as actual or threatened injury in fact due to challenged conduct, and the injury is fairly traced to that conduct and likely to be redressed by a favorable decision. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). The injury in fact element also coincides with injury in fact necessary to challenge agency conduct. *Center for Auto Safety v. National Highway Traffic Safety Administration*, 793 F.2d 1322, 1331 (D.C. Cir. 1986).

The district court and the court of appeals in *Burford II* considered two sets of affidavits supporting Respondent's standing to sue. The first set were filed in April, 1986. See Affidavits by Peggy Kay Peterson, App. 190a; Richard Loren Erman, App. 187a; and Lynn Greenwalt, App. 193a. The supplemental affidavits were filed in 1988 following the hearing on summary judgment. See Affidavits by David Doran, Respondents App. 1, Merlin McColm, Respondents App. 4, A.L. Ouellette, Respondents App. 11, Stephen Blomeke, Respondents App. 7, and Peggy Kay Peterson, Respondents App. 15.

The question of whether Respondent had standing to sue was not before the court of appeals which only reviewed the preliminary injunction and concluded that Respondents had met the minimum necessary at that stage of the case.

The district court did not consider whether even the first three affidavits established standing to sue until 1988 in the context of motions for summary judgment.<sup>4</sup> *National Wildlife Federation v. Burford*, 699 F. Supp. 327 (D.D.C. 1988), App. 158a. At that time, the court concluded that the affidavits failed to state

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<sup>4</sup> The Court of Appeals incorrectly concludes that the district court had found that the Respondent had standing based upon the affidavits Respondent filed in support of its motion for summary judgment. This is incorrect. The affidavits were not before the district court when it ruled on the motions to dismiss or the preliminary injunction.

specific facts necessary to show injury in fact. *Id.* at App. 34a to 37a.

Respondent offered the supplemental affidavits in response to the flaws identified by defendants in their briefs and at the summary judgment hearing. The district court refused to consider them because they exceeded the scope of this order and were filed long after the motion for summary judgment and initial briefing had been completed.

The district court correctly concluded that Respondent had ample opportunity to establish its standing and could properly be held to the record then before the court. Subsequent events support the correctness of the court's conclusion.

In 1986, Respondent resisted any inquiry into the facts stated in the affidavit by obtaining a protective order from the court denying discovery. Respondent took the position that the affidavits were sufficient and any discovery would be only cumulative and therefore abusive.

Respondents' assertion that they were surprised by the standing issue being raised in the district court is not credible. The issue of standing is jurisdictional and can be raised at any time. The issue was pursued in the briefs on the motions for summary judgment. Defendants provided information contradicting Respondent's claim that the withdrawal revocations and the classification terminations were really the cause of Respondent's concerns.

Respondents chose not to address these identified defects with supplemental affidavits when it could have within the briefing schedule set by the district court.

The utilization of supplemental affidavits are shielded from scrutiny to support standing renders the Constitutional requirement that a party must be "directly harmed" meaningless *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 685 (1973), and fundamentally unfair.

## II.

### THE SUPPLEMENTAL AFFIDAVITS CANNOT BE ACCEPTED UNCRITICALLY

Petitioners repeatedly argued, and the district court correctly concluded, that the affidavits and Respondent's allegations vastly overstated the scope of the actions on their members' interests. As a result, the district court held that Respondent failed to prove its injury in fact with the requisite specificity.

This is not a matter of arguing that Respondent's affiants do not correctly state the facts, but that their conclusions that the withdrawal revocation or the classification termination is the cause of the threatened development.

For instance, Petitioners established that the Wyoming classification termination for the South Pass/Green Mountain area in Wyoming encompassed

2 million acres, but that less than 4500 were in fact previously closed to mining and were recently opened. Thus, an allegation by Respondent member Peterson that she sued land in the vicinity of the 2 million acres area was meaningless.

This was equally true for the Arizona Strip withdrawal revocation that involved almost 2 million acres, less than 23,000 of which were opened to metalliferous mining. The entire area was previously open to metalliferous mining.

The supplemental affidavits suffer from the same problem. For instance, Merlin McColm complains that Executive Order water reserves were revoked and now mining is causing sedimentation and degradation of the wildlife habitat. Respondent's Opposition to Petition for Writ of Certiorari, App. 4, ¶ 7. These facts may be independently true. However, the mining in this area is gold mining, a metalliferous metal. This has always been permissible and the withdrawal revocation that only opened the land to mining for non-metalliferous metals did not affect the status of the land. Thus, the claimed injury, mining's impacts on Respondent's member, has nothing to do with the challenged withdrawal revocation.

Similar questions are raised with respect to the other affidavits. For instance, Stephen Blomeke complains about the withdrawal revocations in Colorado opening campgrounds and recreation areas to mining. Respondent's Opposition to Petition for a Writ of Certiorari, App. 7, ¶ 8. The order in question revoked

the withdrawals, because the construction of campgrounds anticipated never occurred. Similarly, A.L. Ouellette complains about the revocation of orders protecting the Tent Rocks Picnic Area and other areas in the Gila National Forest. Respondent's Opposition to Petition for a Writ of Certiorari, App. 11, ¶ 7. However, the Gila National Forest order did not open land to mining and mineral leasing, because those uses had always been permitted. The order only protected the land from operation of sale and exchange laws that were repealed in 1976 with passage of the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701, n. 702.

*Amici* does not intend by this discussion to conclusively rebut Respondent's affidavits. However, it shows the flaws in permitting the use of such affidavits at the end of a case, when the Respondent has resisted any inquiry into the facts alleged and there is no opportunity to test the accuracy of the statements.

### CONCLUSION

This is an important case raising important procedural issues. The presence of substantive issues should not outweigh the inquiry into whether the case is suitably postured for federal court adjudication. The decision of the court of appeals opens the door to abuse of the standing criteria by sharply limiting inquiry into stated bases for injury in fact and permitting last minute supplemental filings that cannot be effectively examined and questioned. In short, the court of appeals reduces the standing to sue requirement to a

pro forma matter that can be cured by magic words. The decisions of this Court impose a much more stringent standard and *amici* urge this Court to reverse the decision of the court of appeals.

Respectfully submitted

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14  
No. 89-640

Supreme Court, U.S.  
FILED  
MAR 2 1990

SPANIOL, JR.  
CLERK SPANIOL, JR.

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

MANUEL LUJAN JR.,  
SECRETARY OF THE INTERIOR, *ET AL.*,  
*Petitioners,*

v.

NATIONAL WILDLIFE FEDERATION, *ET AL.*,  
*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the District of Columbia Circuit

**BRIEF OF AMICI CURIAE**  
**THE WASHINGTON LEGAL FOUNDATION AND THE**  
**HONORABLE STEVEN D. SYMMS, UNITED STATES SENATOR,**  
**IN SUPPORT OF PETITIONERS**

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1989

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No. 89-640

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MANUEL LUJAN JR.,  
SECRETARY OF THE INTERIOR, *ET AL.*,

Petitioners,

v.

NATIONAL WILDLIFE FEDERATION, *ET AL.*,

Respondents.

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On Writ of Certiorari To the United States  
Court of Appeals for the District of Columbia Circuit

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**BRIEF OF AMICI CURIAE  
THE WASHINGTON LEGAL FOUNDATION  
AND THE HONORABLE STEVEN D. SYMMS,  
UNITED STATES SENATOR,  
IN SUPPORT OF PETITIONERS**

**INTERESTS OF AMICI CURIAE**

The Washington Legal Foundation ("WLF") is a non-profit, public interest law and policy center based in Washington, D.C. which is dedicated to supporting the

free enterprise system and promoting the principles of judicial restraint. Current membership in the WLF is approximately 120,000, and includes businesses as well as individuals. WLF advances its objectives through litigation and participation in administrative proceedings in both state and federal forums. To this end, WLF has appeared before this Court as well as other state and federal courts as *amicus curiae* in cases affecting business.<sup>1</sup> As a representative of business interests, WLF is vitally interested in promoting the certainty, predictability, and financial stability of business interests. WLF believes that these objectives are thwarted by undue judicial interference with the actions of the elected branches of government.

The Honorable Steven D. Symms is a United States Senator representing the State of Idaho. Senator Symms is concerned with land-use policy regarding public lands located in Idaho and other states.

Judicial interference with the massive federal program challenged in this case has disrupted an extraordinary number of business transactions, has subverted the establishment of a comprehensive land-use policy for public lands, and has violated the principle of separation of powers. Accordingly, WLF and Senator Symms file this brief as *amici curiae* urging reversal of the decision below.

WLF and Senator Symms submit this brief on behalf of petitioners with the written consent of both parties.

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<sup>1</sup>See e.g., *H.J., Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893 (1989); *Meese v. Keene*, 481 U.S. 465 (1987); *Fisher v. City of Berkeley*, 475 U.S. 260 (1986); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

## STATEMENT OF THE CASE

In the interests of judicial economy, *amici* adopt by reference the statement of the case set forth by petitioners.

## SUMMARY OF ARGUMENT

Prior to 1970, the traditional standing requirement of a particularized injury was consistently applied by the Court to all manner of cases. The Court's uniform application of this requirement was critical to restricting the federal judiciary to its limited constitutional role under the principle of separation of powers: protection of individual rights, rather than the administration of public policy.

During the early 1970s, however, the Court appeared to dramatically relax this traditional standing requirement. In a series of cases brought under the Administrative Procedure Act (the "APA"),<sup>2</sup> the Court held that a single individual had standing to seek judicial review of virtually any executive branch action of widespread application, merely by alleging injury to a generalized legal right or interest.

This dramatic shift in the Court's approach to standing halted abruptly in the mid-1970s. Since then, the Court has repeatedly reiterated that the particularized injury requirement is a necessary element of standing. Because, however, none of these latter cases arose under the APA, and thus did not expressly address the relaxed standing requirements applied by the Court in that context, lower courts have continued to apply a more relaxed standing doctrine in cases brought under

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<sup>2</sup>Pub. L. No. 89-554, 80 Stat. 392 (codified as amended in various sections of 5 U.S.C.).

the APA. This case presents the Court with the opportunity to restore the traditional standing requirement of a particularized injury to cases arising under the APA.

The failure of the lower courts to apply the requirement of a particularized injury in the administrative context has led to a steady erosion of the principle of separation of powers, resulting in "an overjudicialization of the process of self-governance."<sup>3</sup> The federal judiciary, rather than elected officials, has increasingly assumed the role of administrator of public policy.

This lawsuit epitomizes the failure of the judicial branch to adhere to traditional standing principles in the administrative law context. Through alleged injury to two individuals, the judicial branch has assumed jurisdiction over, and virtually nullified, an entire federal program of nationwide application. This intervention by the judiciary occurred despite the clear expression of Congress that it supported -- and intended to retain oversight and control over -- the executive branch program at issue.<sup>4</sup> Moreover, although petitioner has characterized the issue in this case as one of inadequate

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<sup>3</sup>Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881 (1983).

<sup>4</sup>Congress enacted the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701-1784 (1988), in order to establish a comprehensive land-use policy for public lands. 43 U.S.C. § 1701 (1988); H.R. Rep. No. 1163, 94th Cong., 2d Sess. (1976), reprinted in 1976 U.S. Code Cong. & Admin. News 6175. The FLPMA repealed certain "implied" withdrawal authority of the President, and redelegated this authority to the Secretary of Interior. *Id.* at 6203. Through such redelegation Congress retained control over the disposition of public lands, including the ability to reject withdrawal termination recommendations of the Secretary of Interior. *Id.* at 6183-84. See also 43 U.S.C. § 1714(l) (1988).

pleading,<sup>5</sup> amici contend that even if respondent alleged a "direct injury" to its members, it lacks standing to challenge the program at issue. Respondent's asserted injury, if any, is a generalized one, shared equally by all citizens of the nation, and therefore is not cognizable under traditional requirements of standing.

Amici will argue that the Court must restore the traditional standing requirement that a plaintiff's asserted injury be a particularized one, which sets him apart from other citizens, and that this Court must emphasize that this requirement applies to litigation arising under the APA. This traditional understanding of the doctrine of standing is critical to restricting the judicial branch to its constitutional role of protecting individual rights rather than generalized societal goals. Under the doctrine of separation of powers, the former is committed to the courts, while the latter is the sole province of the elected branches.

## ARGUMENT

### A. The Requirement Of A Particularized Injury Is Essential To Preserving The Principle of Separation of Powers.

The doctrine of standing is fundamental to the maintenance of our constitutional form of government.<sup>6</sup>

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<sup>5</sup>Petition for Writ of Certiorari, *Lujan v. National Wildlife Fed.*, No. 89-640, at (i).

<sup>6</sup>This Court has "consistently given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 109 S. Ct. 647, 658 (1989). The Constitution provides that each branch of government will exercise "inher-

(continued...)

Its purpose is to confine the judicial branch to the exercise of its "inherently distinct" power to adjudicate the rights of individuals as presented in "cases" or "controversies."<sup>7</sup> Whereas the elected branches of government are concerned chiefly with broad societal interests, the judiciary is concerned with individual or minority rights,<sup>8</sup> including rights that may be threatened as a consequence of legislative or executive action. The doctrine of standing serves to identify the individuals or minority groups entitled to judicial protection and to ensure that such protection is available where the legally protected rights of those individuals or groups are infringed or threatened. *Allen v. Wright*, 468 U.S. 737, 750 (1984).

In *Frothingham v. Mellon*, 262 U.S. 447 (1923) ("*Frothingham*"), the Court articulated the importance of the doctrine of standing, and especially the requirement of a particularized injury, in preserving the principle of separation of powers. In *Frothingham*, a taxpayer sought to restrain payments from the United States Treasury to several states that chose to participate in a federal program established through the Maternity Act of 1921. The plaintiff claimed that the federal government lacked power to appropriate money for the reduction of maternal and infant mortality, and that such

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<sup>6</sup>(...continued)

ently distinct" powers, and will act as "'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57-58 (1982) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (*per curiam*)).

<sup>7</sup>U.S. Const. art. III, § 2.

<sup>8</sup>*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) ("The province of the Court is, solely, to decide on the rights of individuals . . .").

appropriations would cause an increase in her taxes and "thereby take her property without due process of law." *Id.* at 486. The Court did not reach the merits of the claim, holding instead that neither her purported injury nor the "right" invaded was an appropriate basis on which to invoke the power of the Court. The taxpayer's "interest in the money of the treasury . . . is shared with millions of others, is comparatively minute, and indeterminable, and the effect upon future taxation . . . so remote, fluctuating and uncertain that no basis is afforded" for judicial review. *Id.* at 468. In order to merit standing, the Court wrote:

The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

*Id.* at 488. *Frothingham* thus concluded that unless a litigant asked the Court to resolve a dispute that affected him *particularly*, as opposed to the public at large, the dispute was to be resolved not in Court, but in the elected branches of government. *Id.*

## B. The Elimination Of The Particularized Injury Requirement Eviscerates The Principle Of Separation Of Powers.

The *Frothingham* requirement of particularized injury was applied uniformly by the Court until 1970, both in cases arising under the APA<sup>9</sup> and in other

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<sup>9</sup>E.g., *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (holding that drug manufacturers had standing under the APA to  
(continued...))

contexts.<sup>10</sup> In 1970, however, this Court imputed to Congress the intent to eliminate the particularized injury requirement in lawsuits brought under the judicial review provision of the APA. This provision states that "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." 5 U.S.C. § 702 (1988). In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) ("*Data Processing*"), the Court interpreted this provision to confer standing on any complainant under the APA so long as "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153. The Court thereby "[enlarged] the class of people who may protest administrative action" under the APA. *Id.* at 154. Indeed, the Court noted in dictum that the expanded construction of the APA embraced "'aesthetic, conservational, and recreational' as well as economic values." *Id.* at 154 (quoting *Scenic Hudson Preservation Soc'y Conf. v. Federal Power Comm'n*, 354 F.2d 608, 616 (2d Cir. 1965)). This broad construction of the judicial review provision of the APA has had the effect of allowing persons to sue under the APA

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<sup>9</sup>(...continued)

challenge Food and Drug Administration regulations specifically directed at drug manufacturers); *American Trucking Ass'ns, Inc. v. United States*, 364 U.S. 1 (1960) (granting standing under the APA to a trucking association to challenge a regulation affecting railroads due to the pecuniary interests of competitors).

<sup>10</sup>E.g., *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) (holding that "[t]he common thread underlying [standing] requirements is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation").

regardless of whether they can allege a particularized injury.

Two cases subsequent to *Data Processing* illustrate the effect that decision has had on environmental litigation brought under the APA. In *Sierra Club v. Morton*, 405 U.S. 727 (1972) ("*Sierra Club*"), an environmental organization sued to enjoin the development of a ski area in California's Sequoia National Park. The organization averred that the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." *Id.* at 734. The Court held that, although the asserted injury to plaintiff's "aesthetic and environmental" interests was judicially cognizable,<sup>11</sup> the Sierra Club had not alleged that "its members use [the Park] for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of respondents." *Id.* at 735. Unlike the plaintiff in *Data Processing*, the Sierra Club had not suffered an "injury in fact," and therefore did not satisfy the traditional requirements of standing. *Id.*

The pleading defect of *Sierra Club* was held to be remedied in *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) ("*SCRAP*"). In *SCRAP*, an environmental association filed suit to enjoin an order by the Interstate Commerce Commission allowing railroads to collect a 2.5% rate surcharge. The basis of the association's claim was that the railroad rate surcharge would make the transportation of glass, paper, metals and other recyclable

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<sup>11</sup>As in *Data Processing*, 397 U.S. at 154, the Court in *Sierra Club* indicated that "aesthetic and environmental interests" are cognizable under the APA without specifying the underlying statute that protects these interests. 405 U.S. at 734.

materials to recycling centers too costly. As a consequence, there would be less recycling, an increase in landfills and litter, and greater use of natural resources rather than recycled materials. The association's members claimed that they would be personally harmed by the resultant air pollution from a decreased use of incinerators, that the local parks and forests on which they claimed to recreate would be scarred from natural resource exploitation and garbage, and that use of new resources would increase the cost of finished goods. *Id.* at 678, 680 n.8; *id.* at 700 (Douglas, J., dissenting).

The Court held that the association members had alleged "a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected." *Id.* at 689. The Court reaffirmed its prior holding in *Sierra Club* that "[a]esthetic and environmental" injury was redressable by the courts, *id.* at 686, and concluded that "the fact that all those who used those [natural] resources suffered the same harm" did not deprive the association of standing. *Id.* at 686-87. Indeed, the Court intimated that "all who breathe the air" could challenge the surcharge. *Id.* at 682. This statement illustrates the extent to which the particularized injury requirement had been abandoned in environmental litigation brought under the APA.

### C. The Particularized Injury Requirement Should Be Applied Uniformly To All Cases.

One year after *SCRAP* the Court returned to the traditional standing requirement of particularized injury and has continued to enforce this requirement against litigants who assert generalized grievances in federal courts. For example, in *United States v. Richardson*, 418 U.S. 166 (1974), the Court declined to grant stand-

ing to a taxpayer who sought to compel the Secretary of the Treasury to publish an accounting of the receipts and expenditures of the Central Intelligence Agency ("CIA"). Congress had not required such an accounting in the Central Intelligence Agency Act of 1949, the organic act of the CIA. The Court wrote that, although the plaintiff possessed a "genuine interest in the use of funds, . . . he has not alleged that, as a taxpayer, he is in danger of any particular concrete injury as a result of the operation of the statute." *Id.* at 177. Accordingly, the plaintiff merely was seeking to employ a "federal court as a forum in which to air his generalized grievances about the conduct of government." *Id.* at 173 (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)).

Similarly, in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), the Court denied standing to citizens who sought to enforce the incompatibility clause, U.S. Const. art. I, § 6, cl. 2, of the Constitution against Members of Congress who held reserve military commissions. As citizens, the Court held, plaintiffs alleged only "the abstract injury in nonobservance of the Constitution . . . ." *Id.* at 223. The Court wrote that the need for a distinct injury not shared by the citizenry in general is essential to standing, particularly where "the relief sought would, in practical effect, bring about conflict with the coordinate branches." *Id.* at 222.

In *Allen v. Wright*, 468 U.S. 737 (1984), the Court denied standing to parents of black schoolchildren in a challenge to a decision by the Internal Revenue Service to confer tax-exempt status on allegedly racially discriminatory private schools. The parents claimed that government support of such schools increased the stigma caused by racial discrimination. While noting that stigmatic injury is judicially cognizable, the Court held that "such injury accords a basis for standing only

to 'those persons who are personally denied equal treatment by the challenged discriminatory conduct.'" *Id.* at 738 (quoting *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984)). Thus, this Court has repeatedly reaffirmed the traditional requirement that one must assert a particularized injury to have standing to challenge governmental action in federal court.<sup>12</sup>

As the foregoing discussion demonstrates, in the years since *SCRAP*, the Court has revisited the requirements of standing in various cases not arising under the APA. In each of those cases the Court held that the particularized injury requirement was a necessary element of standing without which a citizen simply could not sue. There is no principled explanation for the more relaxed standing requirement in *Data Processing, Sierra Club* and *SCRAP*. Unfortunately, those cases have paved the way for "a flood of new litigation . . . seeking judicial assistance in protecting our natural environment" through claims that executive officials have "failed to live up to the Congressional mandate." *Calvert Cliffs Coordinating Comm'n v. Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971). As with the instant case, litigation arising under

<sup>12</sup>See also *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (holding that "federal court[s] may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional"); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) (holding that taxpayers do not have standing to challenge an incidental disposition of government property by an executive officer as inconsistent with the establishment clause); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (holding that plaintiff must allege an injury that is "distinct and palpable") (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)); *Baker v. Carr*, 369 U.S. 186, 208 (1962) (noting that citizens cannot invoke standing predicated on "the right, possessed by every citizen, to require that the Government be administered according to law") (quoting *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922)).

the APA has effectively substituted federal judges for both legislators and executive officials with respect to public policy regarding our natural environment and public lands.<sup>13</sup> This case presents the Court with the opportunity to correct this aberration -- and its undermining of the principle of separation of powers -- by restoring the rule of particularized injury to cases arising under the APA.

#### D. Respondents Have Not Alleged A Particularized Injury.

The essence of respondents' purported injury in this case is that "its many members who 'use and enjoy the

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<sup>13</sup>The Court's description of the facts in *Sierra Club* illustrates how environmental plaintiffs have resorted to courts after failing to realize their public policy goals through the political process:

Representatives of the Sierra Club, who favor maintaining Mineral King largely in its present state, followed the progress of recreational planning for the valley with close attention and increasing dismay. They unsuccessfully sought a public hearing on the proposed development in 1965, and in subsequent correspondence with officials of the Forest Service and the Department of the Interior, they expressed the Club's objections to Disney's plan as a whole and to particular features included in it. In June 1969 the Club filed the present suit in the United States District Court for the Northern District of California, seeking a declaratory judgment that various aspects of the proposed development contravene federal laws and regulations governing the preservation of national parks, forests, and game refuges, and also seeking preliminary and permanent injunctions restraining the federal officials involved from granting their approval or issuing permits in connection with the Mineral King project.

405 U.S. at 729-730. Judicial indulgence of the Sierra Club after its defeat in the political arena clearly would have subverted the democratic process by implementing the views of a minority over the clearly expressed views of the majority.

environmental resources that will be adversely affected by the challenged actions' would be deprived of such use by the development of these lands." *National Wildlife Fed'n v. Burford*, 878 F.2d 422, 426 (D.C. Cir. 1989). Respondents predicate their standing on the alleged injury of two individuals who recreated on land "in the vicinity of" parcels of land affected by the Secretary's action. The district court held that this allegation was insufficient to support standing because it did not meet the "injury in fact" requirement of standing.<sup>14</sup> *Burford*, 699 F. Supp. 327, 332 (D.D.C. 1988), *rev'd*, 878 F.2d 422 (D.C. Cir. 1989). *Amici* maintain that even if, *arguendo*, these two individuals alleged that they recreated *directly* on land affected by the petitioner's actions, respondents still do not show the requisite particularized injury to challenge the federal program at issue.

Respondents' asserted injury is the diminished ability to recreate on public land due to its potential development. But the ability of each citizen to recreate on this public land is diminished equally. Respondents do not claim, nor can they claim, that they possessed a greater right than their fellow citizens to recreate on the affected parcels of land; they claim merely to have exercised this right more than their fellow citizens on two separate parcels, which together account for a minute fraction of the land affected by the petitioner's challenged actions. Accordingly, respondents are not *distinctly* affected by the diminished right to recreate.

Furthermore, past use does not indicate the existence of an interest, it merely indicates the strength of the individual's interest. Respondents may *care* more

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<sup>14</sup>In essence, the district court viewed this case as analogous to *Sierra Club v. Morton*, 405 U.S. 727 (1972), discussed *supra* part B. *Burford*, 699 F. Supp. at 331-32.

about this diminishment, but "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Valley Forge*, 454 U.S. at 486. Nor can past use be used to presume that there will be future injury. See *Los Angeles v. Lyons*, 461 U.S. at 106. This lawsuit is simply a dispute involving public interests to public land. Accordingly, respondents must convince their fellow citizens of more enlightened uses of this land through the political process, rather than through the courts.

## CONCLUSION

The relaxation in administrative law cases of the traditional standing requirement of a particularized injury is wholly lacking in any principled justification. The effect of this relaxed standing requirement is the erosion of the principle of separation of powers and the usurpation by the judiciary of powers entrusted by the Constitution to the elected branches of our government.

The Court should recognize the equal importance, in litigation arising under the APA, of the particularized injury requirement in preserving the principle of separation of powers. In so doing, the Court should reconsider its decisions in *Data Processing*, *Sierra Club* and *SCRAP* in the light of its more recent decisions.

For the foregoing reasons, the decision of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1989

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MANUEL LUJAN, JR., *et al.*, PETITIONERS

*v.*

NATIONAL WILDLIFE FEDERATION, RESPONDENT

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On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

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BRIEF AMICI CURIAE OF THE  
AMERICAN FARM BUREAU FEDERATION AND THE  
WYOMING FARM BUREAU FEDERATION  
IN SUPPORT OF PETITIONERS

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**In the Supreme Court of the United States**

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*v.*

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On Writ of Certiorari to the  
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BRIEF AMICI CURIAE OF THE  
AMERICAN FARM BUREAU FEDERATION AND THE  
WYOMING FARM BUREAU FEDERATION  
IN SUPPORT OF PETITIONERS

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**INTEREST OF THE AMICI CURIAE <sup>1</sup>**

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-

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<sup>1</sup> Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 37.

For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. AFBF has member organizations in 50 states and Puerto Rico (including the Wyoming Farm Bureau Federation), representing more than 3.6 million member families. AFBF's farmer and rancher members produce virtually every kind of agricultural commodity produced in the United States.

The Wyoming Farm Bureau Federation (WYFB) is a voluntary, non-profit, general farm organization incorporated under the laws of the State of Wyoming, representing more than 8,000 member families. WYFB's purpose is to represent, service, and protect the interests of farmers and ranchers in the State of Wyoming.

Farm Bureau members have a direct and vital interest in the outcome of this case. The orderly management and use of federal lands, especially in the western region of the United States, is of paramount importance to member farmers and ranchers whose private lands lie adjacent and are often tied economically to such federal lands. Many Farm Bureau members in the western states are adversely affected by restrictions on federal land managers such as those imposed by the court of appeals. Farm Bureau members accordingly have a strong interest in ensuring that the decisions of the federal land managers with whom they must work on a daily basis are not subjected to the uncertainty and vulnerability that flows from permitting challenges to those decisions to proceed simply by virtue of the claim that one of respondent's members uses federal land "in the vicinity" of millions of acres of other federal land.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the limitations that the doctrine of standing and our system of separation of powers impose on the exercise of federal judicial power. Respondent's complaint seeks judicial rescission of more than 1,250 Bureau of Land Management (BLM) land use decisions affecting more than 180 million acres of land throughout the Nation; it also requests an order compelling BLM officials to rescind all internal directives relating to such land status determinations.

The district court granted summary judgment for petitioners because respondent failed to show that any of its members used public land affected by any BLM decision. Reversing, the court of appeals held that the district court should have "presumed" that one of respondent's members uses an affected parcel, and that such presumed use entitles respondent to press its claim for intrusive injunctive relief with respect to all post-1981 land status decisions. This ruling is fundamentally unsound.

A. Article III requires a plaintiff seeking to invoke federal-court jurisdiction to enjoin agency action to demonstrate that the challenged action threatens him with a distinctive personal injury. Where, as here, an environmental organization claims that governmental action has impaired the use and enjoyment of a natural resource, the organization must show that "its members use" that resource. *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). Moreover, even at the pleading stage, this Court has refused to supply by inference factual allegations necessary to support the plaintiff's personal stake in the litigation. See, e.g., *Allen v. Wright*, 468 U.S. 737, 758-59 (1984). The plaintiff himself must allege "specific,

concrete facts" showing the required injury. *Warth v. Seldin*, 422 U.S. 490, 508 (1975).

The court of appeals' "presumed" injury theory is utterly inconsistent with these established principles. Beyond this, the court's presumption cannot be reconciled with the dictates of Rule 56 of the Federal Rules of Civil Procedure, which required respondent (as the party having the burden of proof) to adduce sufficient evidence of injury to support a finding in its favor at trial.

B. The court of appeals' further ruling that the presumed aesthetic injury from a land use decision affecting one parcel entitles respondent to seek rescission of all BLM land status decisions rests on a fundamental misconception of the core purposes served by the standing doctrine.

Implicit in the court's decision is the notion that standing rules serve only to ensure vigorous advocacy. Given this minimalist view, the court's presumptive injury theory and its expansive conception of judicial power are unsurprising; vigorous advocacy can be expected from organizations like respondent. In fact, however, "the law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen*, 468 U.S. at 752. For that reason, where, as here, a plaintiff seeks the assistance of the federal courts in its effort to reverse hundreds of separate decisions made by the Executive Branch, "the standing inquiry requires careful judicial examination" to determine whether the "particular plaintiff" may press "the particular claims asserted." *Ibid.* And in conducting this inquiry, federal courts are constrained by the principle that federal judicial power should only be exercised "as a necessity." *Ibid.* (citation omitted).

The court of appeals' decision conflicts with these fundamental principles. To begin with, based on a presumed injury from an isolated land use decision, it permits respondent to use the federal courts as a vehicle for attacking hundreds of BLM land status decisions that have caused it no injury and that are deemed advantageous by those with a direct interest in the lands. Moreover, the sweeping relief sought by respondent would require pervasive judicial oversight of the Executive's performance of its delegated land management functions. Under these circumstances, the structural values protected by the standing doctrine compel the conclusion that there is no "necessity" for the exercise of federal judicial power countenanced by the court of appeals in this case.

#### ARGUMENT

Article III of the Constitution confines the federal judicial power to "Cases" and "Controversies." The requirement that a plaintiff have standing derives directly from this express limitation. See, e.g., *Allen v. Wright*, 468 U.S. 737, 751 (1984). To have standing under Article III, a "plaintiff [must] allege[] such a personal stake in the outcome of a controversy as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975) (quotation omitted and emphasis in original).

This Court has consistently held that a plaintiff must satisfy a three-part test in order to demonstrate the required "personal stake." First, it must allege a "personal injury" that is "distinct and palpable" as opposed to "abstract" or "conjectural" or "hypothetical." *Allen*, 468 U.S. at 751 (quoting *Warth*, 422 U.S. at 501, and *City of Los Angeles v.*

*Lyons*, 461 U.S. 95, 101-102 (1983)). Second, that injury must be "fairly traceable" to the allegedly unlawful conduct of the defendant. *Allen*, 468 U.S. at 751 (citation omitted); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). Finally, a favorable decision must be "likely to \* \* \* redress[]" the injury. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976). Accord *Allen*, 468 U.S. at 751. Each of these elements must be shown not by conclusory assertions but by "specific, concrete facts." *Warth*, 422 U.S. at 508.<sup>2</sup>

Moreover, "[t]he idea of separation of powers \* \* \* underlies standing doctrine," *Allen*, 468 U.S. at 759, and the application of the standing test in a particular case should be guided by separation of powers considerations (*id.* at 761 n.26). Thus, "[t]his Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Id.* at 754.

The court of appeals' decision manifestly disregards these salutary limitations on the exercise of federal judicial power. To begin with, the court erroneously *presumed* that respondent has a "personal stake" in this litigation. Beyond this, the court impermissibly allowed respondent to use its presumptive aesthetic injury from a single decision affecting a 4,500-acre tract of land to secure citizen standing to subject to federal court supervision hundreds of federal land use decisions affecting 180 million acres of land.

<sup>2</sup> That respondent has invoked the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 702,

**I. THE COURT OF APPEALS SHOULD HAVE SUSTAINED THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT BECAUSE RESPONDENT FAILED TO MEET ITS BURDEN OF DEMONSTRATING THAT IT WOULD SUFFER A DISTINCT PERSONAL INJURY FROM ANY DECISION OF THE FEDERAL BUREAU OF LAND MANAGEMENT.**

In an effort to establish its organizational standing to challenge the legality of hundreds of Bureau of Land Management (BLM) decisions affecting 180 million acres of federal land, respondent submitted an affidavit of one of its members, Ms. Peterson, which asserted that her "recreational use and aesthetic enjoyment of federal lands \* \* \* in the vicinity of South Pass-Green Mountain, Wyoming" are "adversely affected" by a BLM decision "opening up" the South Pass-Green Mountain area to the staking of mining claims. Pet. App. 191a (emphasis added). The South Pass area to which the Peterson affidavit refers comprises 2 million acres, and the challenged BLM decision opened only 4,500 acres to the staking of mining claims. *Id.* at 17a, 34a-35a.

Because respondent's affidavit asserted only that she used lands "in the vicinity" of the 2 million acre tract, and respondent introduced no evidence that she used the small parcel to which the challenged BLM decision related, the district court concluded that respondent had failed to satisfy its burden of demonstrating "injury in fact" from the 4,500 acre land use decision, much less from the "hundreds of decisions

does not relieve it of its threshold obligation to meet the standing requirements of Article III. See, e.g., *Valley Forge*, 454 U.S. at 487 n.24.

affecting 180 million acres spread over seventeen states." Pet. App. 36a. The district court's decision was plainly correct, and the court of appeals' erroneous ruling to the contrary clashes with settled principles governing standing and summary judgment in the federal courts.

A. In *Sierra Club v. Morton*, the Court held that the Sierra Club had failed to establish standing to challenge the Secretary of the Interior's decision to permit development of an area (Mineral King) within a National Park because any "injury w[ould] be felt directly only by those who use Mineral King" and "[n]owhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose." 405 U.S. 727, 735 (1972).<sup>3</sup> *Sierra Club* is fatal to respondent's standing in this case.

As the district court found, respondent made no showing that any of its members use any parcel of land affected by the hundreds of land use decisions challenged by its complaint. The member affidavit on which the court of appeals relied merely alleges use of land "in the vicinity of" a 2 million acre tract, only 4,500 acres (or .225%) of which was opened to mining by the challenged BLM decision. Pet. App. 16a-17a. Respondent made no showing whatever that Ms. Peterson uses any of the affected 4,500 acres. *Sierra Club* leaves no doubt that asserted use of unspecified land "in the vicinity" of 2 million acres

<sup>3</sup> Compare *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), in which the Court held that, for purposes of a motion to dismiss, the plaintiffs had satisfied the injury prong of the standing test by alleging that they personally used the "natural resources" that they alleged had been adversely impacted by federal agency action. *Id.* at 678.

does not confer standing to challenge a land use decision affecting a 4,500 acre tract within the 2 million acre area. 405 U.S. at 734-735.

Acknowledging the insufficiency of the Peterson affidavit on its face, the court of appeals resorted to a "presumption" that "the 4,500 newly opened acres included the areas that Peterson uses." Pet. App. 17a. The court reasoned that, "unless Peterson's language is read to refer to the lands affected by the Program, the affidavit is, at best, a meaningless document." *Ibid.* In other words, the affidavit must be read to establish injury because otherwise it would not support standing.

This Court, however, has clearly rejected the notion that a federal court may presume the existence of a constitutionally required injury. Rather, a party seeking to invoke the federal judicial power must allege "specific, concrete facts" that demonstrate the required personal stake in the litigation. *Warth*, 422 U.S. at 508. Not surprisingly, therefore, the Court in *Sierra Club* did not presume that some Club member had used the particular tract of land that was the subject of the challenged agency decision. Nor did the Court in *Allen* presume that "there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration" (*Allen*, 468 U.S. at 758)—even though, absent such an allegation, the complaint could fairly be characterized as a "meaningless document."

The injury requirement serves to confine the federal courts to their legitimate judicial functions. The notion, implicit in the court of appeals' presumptive

injury theory, that standing is a "gaming device," *Asarco, Inc. v. Kadish*, 109 S. Ct. 2037, 2044 (1989) (opinion of Kennedy, J., joined by Rehnquist, C.J., and Stevens and Scalia, JJ.), by which artful draftsmen may confer the necessary personal stake on organizational bystanders simply cannot be squared with the Article III "case or controversy" requirement.

B. As the Court recently observed, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (citation omitted). The court of appeals clearly ignored this admonition.

The "plain language of Rule 56(c) mandates the entry of summary judgment \* \* \* against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322 (emphasis added). Thus, to avoid summary judgment, respondent was obligated to "set forth specific facts" (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)) that could "lead a rational trier of fact to find" (*Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)) that Ms. Peterson "uses" the 4,500 acre tract affected by the BLM decision. As the district court correctly held, the Peterson affidavit by its terms provides *no* basis for such a finding.

The court of appeals' attempt to cure respondent's evidentiary default by presuming that it would not

have submitted an affidavit that failed to meet its burden of proof frustrates "[t]he very mission of the summary judgment procedure"—"to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." 28 U.S.C. App. 626 (Advisory Comm. Notes to 1963 Amendments to Fed. R. Civ. P. 56). For, under the court of appeals' theory, it is the mere submission—not the substance—of an affidavit that serves to defeat a motion for summary judgment.<sup>4</sup>

The court of appeals' presumptive injury theory also deprives defendants of substantial rights under Rule 56. As this Court has noted, "Rule 56 must be construed with due regard not only for the rights of persons asserting claims \* \* \* that are adequately based in fact to have those claims \* \* \* [adjudicated], but also for the rights of persons opposing such claims

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<sup>4</sup> The court of appeals also suggested that the Peterson affidavit could be deemed "ambiguous regarding whether the adversely affected lands are the ones she uses." Pet. App. 17a. To begin with, this characterization defies the literal terms of the affidavit. At all events, respondent—the party bearing the burden of proof on standing—was required to set forth specific facts demonstrating the use by Ms. Peterson of the affected parcel of land. If the affidavit does not show such use (*i.e.*, if it is ambiguous), Rule 56 mandates the entry of summary judgment. Moreover, even if the affidavit were viewed as ambiguous regarding whether Ms. Peterson uses lands within—and not simply in the vicinity of—the 2 million acre South Pass area, it would be totally irrational for a trier of fact, based on the affidavit, to find that Ms. Peterson uses the 4,500 acre parcel affected by the BLM decision. As noted above, the affected tract comprises only .225% of the South Pass area. Under these circumstances, the only reasonable presumption would be that Ms. Peterson uses lands included in the 99.775% of the South Pass area that was not opened to mining claims by the challenged BLM decision.

\* \* \* to demonstrate in the manner provided by the Rule, prior to trial, that the claims \* \* \* have no factual basis." *Celotex*, 477 U.S. at 327. Here, the court of appeals' utter disregard of petitioners' rights under Rule 56 has placed a cloud over numerous beneficial land exchanges between the BLM and Farm Bureau members—even though virtually none of those transactions even arguably threatens the aesthetic interests espoused by respondent.<sup>5</sup>

**II. THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT USE OF A SINGLE PARCEL OF LAND SUBJECT TO A CLASSIFICATION TERMINATION GAVE RESPONDENT STANDING TO CHALLENGE ALL BLM CLASSIFICATION TERMINATIONS AND WITHDRAWAL REVOCATIONS.**

As shown above, respondent has no standing to challenge the legality of the land use decision relating to the 4,500 acre tract in Wyoming. But even if

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<sup>5</sup> As we explained in our *amicus* brief in support of the petition in this case (at 7-8), many of the western members of the Farm Bureau are neighbors to the public lands. Often historic land ownership patterns have evolved in ways that are inefficient for both the federal land management agencies and the neighboring farms and ranches. To increase the efficient use of both public and private lands, federal land managers and neighboring private owners frequently trade land. By allowing this suit to be heard, however, the court of appeals placed many completed trades in jeopardy. Indeed, hundreds, or perhaps thousands, of land exchanges were blocked on the 180 million acres of federal land involved in this litigation. Almost all of those exchanges were benign to respondent. Many exchanges, such as those to enhance wildlife habitat, were *beneficial* to respondent. Nonetheless, the court of appeals' decision places the judiciary in the position of supervising land exchanges in all western states based on one person's objection to possible mining activity "in the vicinity" of millions of acres of public land.

respondent's factual submission had been sufficient to establish use of the Wyoming parcel, there was no warrant for the court of appeals' further conclusion that such use permits respondent to proceed with litigation subjecting all BLM land use decisions to federal court supervision. The court's expansive conception of the scope of federal judicial power denigrates the significance of (and the core purposes served by) the Article III standing requirement.

A. Generalizations about standing are, of course, necessarily imprecise. Nonetheless, the Court has typically found standing to exist in cases where the plaintiff is among those who are the focus of (and directly harmed by) challenged governmental action—even when the relief sought would not necessarily redress the injury alleged. In *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 256, 261 (1977), for example, the Court held that a developer which had contracted, contingent upon rezoning and federal assistance, to build low- and moderate-income housing had standing to challenge the denial of rezoning even though the requested relief "would not \* \* \* guarantee" that it could proceed because it was not certain to obtain federal subsidization. In such cases, the parties are "classically adverse," *Singleton v. Wulff*, 428 U.S. 106, 113 (1976), and the court is exercising its traditional judicial function at the behest of a plaintiff asserting a "'distinct'" personal injury. *Allen*, 468 U.S. at 751 (citations omitted).

By contrast, the Court has often denied standing in cases where, as here, the plaintiff alleges he has suffered an indirect, widely-shared injury from the failure of governmental officials to conform to legal standards in the performance of their duties, includ-

ing the regulation of (and transactions with) third parties ("public law" suits).<sup>6</sup> These suits do not involve "classically adverse" disputes. For that reason, while "the indirectness of the injury" alleged will not "necessarily" result in a denial of standing, "it may make it substantially more difficult to meet the minimum requirement of Art. III." *Warth*, 422 U.S. at 505. Accord *Allen*, 468 U.S. at 757-758; *Simon*, 426 U.S. at 44-45.

The Court has in fact undertaken a more vigilant inquiry in public law actions to determine whether the injury alleged actually exists, and whether it was in fact caused by the challenged governmental action. The Court's decision in *Simon* is illustrative. There, the plaintiff challenged an IRS ruling extending favorable tax treatment to hospitals that provided some, but not all, services to indigents and alleged that the agency's ruling would cause fewer hospitals to provide full services to the indigents whom it represented.

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<sup>6</sup> See, e.g., *Allen*, *supra* (parents of black public school children did not have standing to challenge procedures by which the IRS enforces the prohibition on tax exemptions for racially discriminatory schools); *Valley Forge*, *supra* (taxpayers did not have standing to challenge transfer of federal property to a third-party); *Simon*, *supra* (indigent plaintiffs did not have standing to challenge an IRS ruling decreasing the amount of services hospitals had to provide to the indigent in order to qualify for certain federal tax treatment); *United States v. Richardson*, 418 U.S. 166 (1974) (citizen taxpayer did not have standing to request that the government be compelled to order the CIA fully to account and report its expenditures and receipts); *Schlesinger v. Reservists Committee To Stop The War*, 418 U.S. 208 (1974) (citizens had no standing to seek mandamus ordering the Defense Department to terminate the reserve commissions of certain Members of Congress).

Noting that the hospitals might decide not to supply full services to indigents even absent the IRS ruling, the Court denied standing, refusing to supply the "inferences" necessary to connect plaintiff's asserted injury with the challenged IRS action. 426 U.S. at 42-45.

The careful standing inquiry in public law actions reflects the Court's recognition of the special dangers posed by such litigation to the core values protected by the standing doctrine. As the Court recently observed, "the law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen*, 468 U.S. at 752. The "exercise of the judicial power \* \* \* affects relationships between the coequal arms of the National Government." *Valley Forge*, 454 U.S. at 473. For that reason, in applying the standing doctrine, a federal court should be guided by "the Art. III notion that federal courts may exercise power only 'in the last resort, and as a necessity,' \* \* \* and only when adjudication is 'consistent with a system of separated powers.'" *Allen*, 468 U.S. at 752 (citations omitted).

In cases where the plaintiff is the direct target of challenged governmental action, the need for the exercise of judicial power is clear, and, under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), its exercise is fully "consistent with a system of separated powers." In public law cases, by contrast, the indirect (and often undifferentiated) nature of the asserted injury draws into question the necessity for resolution of the dispute by judicial rather than "political process." *United States v. Richardson*, 418 U.S. 166, 179 (1974). And where, as here, the plaintiff also challenges hundreds of governmental deci-

sions that are not causally related to its asserted injury and seeks relief that would require pervasive judicial supervision of the Executive's performance of its constitutionally-assigned functions, the exercise of judicial power impairs—unnecessarily—the structural values underlying the standing requirement.

As demonstrated below, the court of appeals' decision is at odds with these basic principles and countenances an impermissible encroachment on the authority of the Secretary of the Interior to make land use decisions throughout the country.

B. This case plainly falls in the public law category. Asserting its aesthetic and recreational interests, respondent challenges more than 1,250 BLM land status changes relating to public lands comprising one-thirteenth of the continental United States. In addition to a declaration that BLM acted unlawfully in connection with all of its classification and withdrawal determinations, respondent seeks an injunction prohibiting the responsible federal officials from "taking any action" inconsistent with land status designations in effect nine years ago, ordering those officials to reinstate the 9-year old designations and to "rescind all directives, instructional memoranda, manuals, or other documents providing information or guidance on the termination of land classifications or land withdrawals." Amended Complaint at 16, 17. The relief sought by respondent would appoint the federal courts "as *de facto* Secretary of the Interior over 180 million acres—nearly one-fourth of all federal lands and more than half of the public lands managed by the Bureau of Land Management." Pet. App. 85a (Williams, J., concurring and dissenting).

The sweeping nature of respondent's challenge to BLM's administration of public lands called for a rigorous application of the standing doctrine. The district court observed that respondent's affidavit submissions (even if they had been sufficient to establish use of specific parcels affected by a BLM land use decision) did "not provide any basis for standing to challenge \* \* \* the legality of each of the 1250 or so individual classification terminations and withdrawal revocations." Pet. App. 36a. The court of appeals' contrary ruling (*id.* at 16a n.12), which permits respondent—on the basis of an affidavit that at best alleges impaired use of 4,500 acres in Wyoming—to challenge hundreds of other land use decisions in 17 states, clashes with settled limitations on standing in public law actions.

1. *Sierra Club* held that an environmental group such as respondent has no standing to challenge governmental action relating to a particular area unless it demonstrates that one of its members uses the area affected by the challenged agency action. Thus, even if respondent had shown that one of its members uses a parcel of land and therefore has standing to challenge the legality of a land use decision relating to that parcel, respondent has no standing to challenge the hundreds of BLM land status decisions from which it has suffered no injury.

The court of appeals nonetheless concluded that the "applicable law governing standing requires that [respondent] be injured by only *one*" (Pet. App. 16a n.12 (emphasis in original)) of those decisions to secure standing to challenge the rest. Pet. App. 18a n.13. The court relied on this Court's observation in *Sierra Club*, 405 U.S. at 740 n.15, that the "test of

injury in fact goes only to the question of standing to obtain judicial review" and, having established standing, "the party may assert the interests of the general public in support of his claims for equitable relief." The quoted language, however, stands simply for the proposition that once a plaintiff establishes that he has standing to challenge the legality of specific agency action, he may then assert "the public interest" in support of *that challenge*. Nothing in *Sierra Club* even remotely suggests that standing to challenge one agency decision confers upon a plaintiff an unrestricted license to challenge other agency actions in which he has no personal stake.<sup>7</sup>

Beyond this, the court of appeals' belief that an organization that has standing to challenge one agency decision may also challenge any other agency action that may be vulnerable to attack on the same legal theory (see Pet. App. 55a-56a) cannot be reconciled with the settled principle that "a federal court \* \* \* is not the proper forum to press general complaints about the way in which government goes about its business." *Allen*, 468 U.S. 760 (quotation omitted). As to all of the BLM land use decisions challenged by its complaint that have caused no harm to its members, respondent's status is indistinguishable

<sup>7</sup> Equally misplaced is the court's reliance (Pet. App. 16a n.12) on *UAW v. Brock*, 477 U.S. 274 (1986), and *Warth*, *supra*. The portions of those opinions to which the court of appeals referred recite merely the uncontroversial proposition that an organization need establish that only one of its members has suffered injury in fact from the challenged action in order to have standing itself. See 477 U.S. at 282-86; 422 U.S. at 511. Neither case suggests that the organization may then challenge other agency actions that have caused no injury to its members.

from that of other concerned citizens who have sought "to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government." *Valley Forge*, 454 U.S. at 483 (citation omitted). The Court has consistently rebuffed those efforts. *Id.* at 482-83; *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *Richardson*, *supra*.

In sum, respondent cannot be permitted to use an alleged aesthetic injury from a single land use decision as a pretext for an assault on all federal land use decisions throughout the Nation "without draining" the "requirements [of Article III] of meaning." *Valley Forge*, 454 U.S. at 482-83. The court of appeals' decision clearly reduces the citizen standing rule to a meaningless and easily evaded technicality.

2. Respondent's complaint charges that the more than 1,250 classification terminations and withdrawal revocations that it seeks to enjoin are part of a "program" to eliminate "protective" restrictions on public lands. Amended Complaint ¶¶ 1, 6. In its earlier panel opinion, the court of appeals erroneously relied on this characterization to justify relieving respondent of its obligation to establish the requisite personal stake in any land use decision that it seeks to enjoin. See Pet. App. 55a.

To begin with, respondent's rhetoric cannot alter the fact that it is challenging hundreds of separate land use decisions over the course of several years. See Pet. 5 (explaining the process by which the distinct land use decisions were reached). There was no single agency action—"program"—lifting the protected status of public lands throughout the nation. Many of the classification terminations and withdrawal revocations initiated by BLM pursuant to

FLPMA do not open additional lands to the staking of mining claims or any other activity that bears any conceivable relation to the aesthetic interest that respondent purports to espouse through this litigation. See Pet. App. 100a-101a (Williams, J., concurring and dissenting). Indeed, among the land use decisions challenged by respondent's complaint were changes that "all viewed as environmentally beneficial." Pet. 8.

Thus, respondent's "program" rhetoric amounts to nothing more than a contention that the federal officials to whom Congress delegated the authority to make land use decisions—see, *e.g.*, 43 U.S.C. § 1714(a) ("the Secretary is authorized to make, modify, extend, or revoke withdrawals")—exercised that responsibility in accordance with the prevailing policy preferences in the Executive Branch. However, "an agency to which Congress has delegated policymaking responsibilities may, within the limits of the delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984).

Moreover, the alleged programmatic goals of federal land administrators could, at most, be described as a "general statement of policy" not subject to challenge under the APA because they would "not establish a 'binding norm'" or be "finally determinative of the issues or rights to which [they are] addressed." *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974) (footnote omitted). Only the actual classification terminations and withdrawal revocations constitute agency action reviewable under the APA, and respondent may not circum-

vent the Article III injury requirement by framing its complaint as a challenge to the purported policy preferences of the petitioners.

More fundamentally, respondent's sweeping challenge to the alleged BLM "program" runs afoul of the separation of powers principles on which the standing requirement is based. To conclude that respondent has been injured by policy preferences of federal land managers "would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication." *Allen*, 468 U.S. at 759-760.

Beyond this, strict adherence to standing limitations is "especially important" in cases where, as here, "the relief sought produces a confrontation with one of the coordinate branches of the Government." *Schlesinger*, 418 U.S. at 222. The relief sought by respondent would constitute "the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action." *Allen*, 468 U.S. at 760 (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972)). Respondent seeks to halt and reverse all classification terminations and withdrawal revocations throughout the Nation, and to rescind all internal directives and memoranda relating to such land use decisions. Here, as in *Allen*, recognition of respondent's standing "to seek a restructuring" of the program allegedly "established by the Executive Branch to fulfill its legal duties" would "run[ ] afoul of [the] structural principle" that the "Constitution, after all, assigns

to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.'" *Allen*, 468 U.S. at 761 (citation omitted).

3. Finally, standing doctrine "reflects a due regard" for those persons most affected by governmental action and seeks to prevent the disruption of mutually-advantageous arrangements by "bystanders.'" *Valley Forge*, 454 U.S. at 473 (citation omitted). Respondent's efforts to rescind all classification terminations and withdrawal revocations throughout seventeen states clashes with this salutary principle.

As demonstrated by the number of *amici* supporting petitioners, those persons with a direct interest in the lands that respondent's members do not use have clearly found the BLM land status changes advantageous. The interests of Farm Bureau members alone (see note 5, *supra*) attest to this fact.

Nor can the court of appeals' decision be justified on the theory that recognition of respondents' standing to challenge all land use decisions is necessary to ensure that those decisions were formulated in accordance with procedural requirements. Those in fact harmed by any land status change may seek redress. And it is not the mission of the federal courts to ensure that harmless decisions are made in strict compliance with abstract legal standards. Rather, "federal courts may exercise power only 'in the last resort, and as a necessity.'" *Allen*, 468 U.S. at 752 (citation omitted).

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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# In the Supreme Court

OF THE  
**United States**

OCTOBER TERM, 1989

MANUEL LUJAN, JR., Secretary of the Interior, et al.,  
*Petitioners,*

VS.

NATIONAL WILDLIFE FEDERATION, et al.,  
*Respondents.*

On Writ of Certiorari  
to the United States Court of Appeals  
for the District of Columbia Circuit

## BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS URGING AFFIRMANCE

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## QUESTIONS PRESENTED

1. Whether federal agencies may escape compliance with the National Environmental Policy Act ("NEPA") and the Federal Land Policy Management Act ("FLPMA") by requiring parties seeking to challenge federal agency noncompliance with those acts to prove standing to challenge each individual decision made under a national program?
2. Whether complex actions by federal agencies are exempt from judicial review by virtue of their breadth?
3. Whether the mere opening of an agency's files to public inspection constitutes compliance with the National Environmental Policy Act?

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1989

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**MANUEL LUJAN, JR.,**  
Secretary of the Interior, et al.,  
Petitioners,

vs.

**NATIONAL WILDLIFE FEDERATION**, et al.,  
Respondents,

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On Writ of Certiorari to the United States  
Court of Appeals for the District of Columbia

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BRIEF OF AMICI CURIAE  
IN SUPPORT OF RESPONDENTS

## INTEREST OF AMICI

The States filing as amici have a vital interest in preserving their ability to participate in the National Environmental Policy Act (42 U.S.C. §4321 *et seq.*; "NEPA") process and the Federal Land Policy and Management Act (43 U.S.C. 1701 *et seq.*; "FLPMA") process. The Bureau of Land Management ("BLM") misconstrues the affidavits of the respondent to hide its true goal: to insulate its actions from judicial review.

BLM seeks nothing less than to overturn decades of development of the standing doctrine to thwart judicial challenges of its Congressionally-mandated duty to comply with NEPA and FLPMA. Such a result would be unfortunate, because, as this Court stated last year, "NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." <sup>1/</sup>

NEPA has special importance for the States because federal actions, both on and off federal lands, significantly affect state resources. The effects are especially felt in western States, where much of the land and natural resources are federally-owned and managed.<sup>2/</sup> In recognition of these special state interests, Congress specifically provided, in Section 102 of NEPA, that States and local governments be included in the federal environmental analysis process.<sup>3/</sup>

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1. *Robertson v. Methow Valley*, 109 S.Ct. 1835, 1845 (1989).

2. BLM manages 17,204,689 acres of public land in California alone. Bureau of Land Management -- California: Annual Report Fiscal Year 1989 at 41.

3. The legislative history of NEPA is also full of references to the need to involve state and local governments in the environmental planning and decisionmaking process. H. Rep. No. 378, 91st Cong., 1st sess. 3-4; H. R. Conf. Rep. No. 765, 91st Cong.,

The NEPA process is the critical avenue through which States may examine and assert their interests in federal decisions. The implementation of FLPMA is another important means for States to participate in this process. The economic and environmental burdens of mitigating the consequences of federal actions increasingly fall on state and local governments. NEPA's environmental impact research, review and disclosure procedure is essential to the States' abilities to plan for and help ameliorate the consequences of federal actions.

The ability to bring suit under NEPA and FLPMA is of special concern to the States because of this fiscal and environmental impact on state resources. The States often rely on federal statutes such as NEPA and FLPMA to challenge decisions by federal agencies such as BLM. If BLM is permitted to shield its decisions from judicial review by misconstruing the procedural requirements of these statutes, it would unjustifiably restrict the ability of States in the future to seek redress

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1st sess. 8-9; reprinted in 1969 U.S. Code Cong. & Admin. News 2751, 2753-54, 2769. NEPA's implementing regulations specifically require that draft environmental impact statements be circulated to appropriate state agencies. 40 CFR §1503.1 (1987).

through the federal judiciary for the "overreaching" of federal agencies.<sup>4/</sup>

The States are particularly interested in the outcome of this action because of the potential for abuse shown by BLM of basic NEPA and FLPMA law. In *National Wildlife Federation v. Burford, et al.*, 878 F.2d 422 (D.C. Cir. 1989), *cert. granted*, No. 89-640, (January 16, 1990), BLM embarked upon a coordinated program to remove federal protections from public lands to open these lands to mining and mineral leasing and oil and gas exploration. Although many of these lands have value as recreational and wilderness areas, and although the program was national in scope, BLM failed to conduct a programmatic environmental impact statement ("EIS"), to develop land use plans, and to notify Congress before deciding to proceed with terminating the federal protections nationwide. No notice was given of this nationwide program, no hearings were held, and no comments were solicited. Instead, its full impact was hidden behind a screen of individual decisions, diverting attention from the impact of the national program.

Amici urge this Court to reject the federal petitioner's revision of established standing doctrine under

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4. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 567, (1985) (Powell, dissenting.)

NEPA and FLPMA, and to support the opportunities to participate in federal agency environmental analyses, so as to ensure that federal agencies do indeed take a "hard look" at the consequences of their programs on the States in which they will be carried out.

## STATEMENT OF THE CASE

Amici adopt respondent's statement of the case.

## SUMMARY OF ARGUMENT

1. A federal agency cannot shield its decisions from judicial review by characterizing a single national program as a series of isolated decisions. BLM's actions in this case stem from one central policy decision, and the challenging party should not have to produce members injured by each of the program's implementations to prove standing.

2. No separation of powers principles are violated by judicial enforcement of NEPA and FLPMA. A federal agency may not escape judicial review merely because a program is large in scope and affects many acres of land. BLM is seeking to strip federal courts of their traditional role of ensuring that federal agencies comply with their Congressionally-mandated duties.

3. The injury caused by a federal agency's failure to comply with the procedural requirements of NEPA and FLMPA is the loss of the opportunity to participate in the federal decision-making process. This harm is not the equivalent of informational injury under the Freedom of Information Act, and cannot be remedied simply by an agency opening up its program files after a decision has been made.

## ARGUMENT

### I

#### **FEDERAL AGENCIES MAY NOT ESCAPE THE PROCEDURAL REQUIREMENTS OF NEPA OR FLPMA BY REQUIRING THAT PARTIES PROVE STANDING TO CHALLENGE EACH INDIVIDUAL DECISION MADE UNDER A NATIONAL PROGRAM IN ORDER TO CHALLENGE AGENCY COMPLIANCE**

The federal agency petitioner's brief is nothing more than a thinly veiled attempt to evade judicial review of its failure to act under NEPA and FLPMA by altering the traditional rules of standing under environmental statutes. Its deconstruction of the respondent's affidavits can not hide its ultimate aim of precluding those with standing from insisting that key NEPA and FLPMA procedures are followed.

#### **A. BLM seeks to portray a national program as a series of separate, unconnected decisions.**

This federal agency's characterization of a truly national program as a set of unconnected local decisions is of great concern to the States. Of greater concern is the implication that a party must establish

standing to challenge such a program by proving its standing to sue on each individual implementation of the program. Such a drastic revision of standing requirements could seriously hamper the ability of both individuals and States to stop legal violations by federal agencies.

To thwart the application of established standing rules, and thus to insulate its actions under NEPA and FLPMA from legal challenge, the federal agency petitioner disingenuously characterizes its national program as "a vast array" of individual decisions. Fed.Br.(i). Despite petitioner's lengthy narrative of the history of federal land use policy, the actions at issue in this case were not unrelated, individual decisions but arose from a deliberate program.

The record in the proceedings below is full of references by BLM to its withdrawal revocations and classification terminations as a program. See, e.g., Department of the Interior, BLM Withdrawal Review Program: A Report of Progress to the National Public Lands Advisory Council, (1985) J.A. 51-54; and Edwards Affidavit 1B, Def.Exh. 21, manual providing guidance for implementation of the Withdrawal Review **Program**, including **Program** Direction, Completion Schedule, **Program** Priorities, Progress Reporting, and Quality Control. (Emphasis added.) See also Pl. Exh. 1, 2, 3, 11, 17, 20, 70, as well as Edwards Affidavit 1C, Def. Exh. 8, all of which are instances where the government refers to withdrawal revocations and

classification terminations as a single coordinated program.

The District Court specifically found that these actions constituted a program. That court, even on remand, defined the proposal as a "**program** concern[ing] the termination of land classifications and the revocation of land withdrawals." Fed. Pet. App. 30a, n. 6. (emphasis added.) If petitioner's position were to be accepted, any national program, no matter how ambitious, could be characterized as a series of individual decisions, in order to frustrate judicial review of an agency's actions.

**B. NWF need not establish standing to challenge the BLM program by producing members injured by each of the program's implementations**

As this Court has written so often in the past, the requirement of standing arises out of Article III's mandate that federal courts only resolve actual "cases" or "controversies." U.S. Const. Art. III, §2. The standing inquiry "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1967). Where standing can not be shown, Article III principles dictate that a court is without

jurisdiction. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982).

In order to invoke the powers of the federal judiciary, certain *de minimis* standards must be met. Most important, and at issue in this case, is that parties must allege they suffer a "distinct and palpable" injury ("injury in fact"), either in the present or in the future, because of the putatively illegal acts of the defendant. *Valley Forge*. The injury must be real, not speculative, though "an identifiable trifle" will do. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 678, 689 (1973). The injury must also be caused by the defendant's putatively illegal acts or threatened acts. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). In addition, the injury must be capable of remedy by the court. *Warth v. Seldin*, 422 U.S. 490 (1975).<sup>2/</sup>

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5. This Court normally finds standing where a plaintiff also meets its "prudential" requirements, relating to whether the injury was within the "zone of interests" meant to be protected by a statute, *Clarke v. Securities Industry Association*, 479 U.S. 388 (1986), is more than a "generalized grievance" shared by many other persons, *Warth, supra*, and whether the plaintiff asserts his own interests rather than those of a third party, *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

Where, as here, standing is claimed as an "aggrieved" or "affected" person under §10 of the Administrative Procedure Act ("APA"), 5 U.S.C. 702, this Court has required that plaintiffs meet its constitutional and prudential requirements. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

Harm to aesthetic and environmental interests, such as is described in the affidavits submitted by plaintiffs below, was long ago recognized as a legitimate basis for alleging sufficient injury to meet the APA and Article III requirements. See, *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978); *SCRAP*; *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Association of Data Processing Service Organizations*. Such harm, even if it is shared by many other people, is evidence of injury in fact so long as the party demonstrates the necessary personal stake in the case. *Public Citizen v. United States Department of Justice*, 109 S.Ct. 2558 (1989).

Though standing is sometimes more easily shown by bringing forth several affected parties, this Court has never required a challenge to a federal agency action to be brought by a certain minimum number of persons or entities.<sup>3/</sup> Nor has this Court required an

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6. C.f. *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), where the Court expressed no concerns about the standing of environmental groups to challenge the failure to prepare a programmatic EIS

organization to submit a declaration from every one of its members to show standing, or to produce multitudes of persons affected by a program. *Warth, supra*. In fact, this Court recently praised the advantages of suits brought by organizations because their organizational purposes lend "expertise" and "concrete adverseness" to disputes. *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, et al., v. Brock*, 477 U.S. 274, 289 (1986).

Traditionally, so long as injury is established by one member of an organization, that organization has shown standing to bring suit in federal court. *See also Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977).

Moreover, despite the petitioner's fervent assertions to the contrary, it is not at all unreasonable for a party, be it a Chamber of Commerce, an individual, or a state, to be able to bring suit against a federal agency based on the injury suffered from one application of a federal statute or program. That has long been the rule. *See, e.g., International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, et al., v. Brock; Kleppe v. New Mexico*, 426 U.S. 529 (1976); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*; *C.f., Austin, et al. v. Michigan State*

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for the development of coal reserves in the Northern Great Plains Region.

*Chamber of Commerce*, No. 88-1569 (March 29, 1990); *Hunt v. Washington State Apple Advertising Commission*.<sup>21</sup>

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7. Petitioner misapplies the standards for judging a nonmoving party's evidence in a motion for summary judgment. NWF's evidence of standing, while perhaps not a model of specificity, was "clearly averred" and clearly appears in the record. *FW/PBS, Inc. v. City of Dallas*, 110 S.Ct. 596 (1990). Comparing the affidavits to others previously approved, the two affidavits originally submitted by NWF in fact strikingly resemble language approved by this Court in other standing cases. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, at 73 ("in the vicinity of"); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 112 (1979) (on motion for summary judgment, plaintiff's complaints alleging harm to "society" construed to mean "neighborhood"); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, at 678, (plaintiffs alleged they used the "forests, rivers, streams, mountains and other natural resources surrounding the Washington metropolitan area"). The remaining affidavits are at least, if not more, specific. In any case, as this Court has pointed out in the past, the appropriate remedy to remove doubt would be to remand for supplementation of the record, not to dismiss. *SCRAP, supra*. *C.f., Celotex v. Catrett*, 477 U.S. 317 (1986).

The argument also confuses an absence of evidence with a dispute of fact. NWF, as a nonmoving party, did not have to prove an element

The actions being challenged in this case stem from a single, central policy decision of the BLM to lift protective land classifications. The fact that this decision has been implemented nationwide cannot deprive injured parties of standing to contest its legal validity.

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of its case at the summary judgment stage. Rather, the petitioner, as the moving party, was required to "show the absence of any disputed material fact." *Adickes v. Kress*, 398 U.S. 144, 158-159 (1970). Looking at the record to establish "the necessary factual predicate [instead of] glean[ing] them from the briefs and arguments," *FW/PBS, Inc. v. City of Dallas*, 107 L.Ed.2d 603, 624 (1990), federal petitioner's evidence indicates that the area at issue is much more compact than the petitioner would have the Court believe. Department of the Interior, Draft Lander Resource Management Plan/EIS (1986).

## II

### **BLM IS SEEKING TO AVOID JUDICIAL REVIEW OF ITS COMPLIANCE WITH FEDERAL STATUTES BECAUSE ITS PROGRAM IS NATIONAL IN SCOPE**

- A. **BLM is attempting to insulate from review its compliance with NEPA and FLPMA on the grounds that its program affects many acres of land.**

This Court should soundly reject the implied argument of this federal agency that a court should not enforce NEPA or FLPMA procedures if the federal agency's program affects many acres of land. Merely because a program is national should not be a basis for allowing a federal agency to evade its NEPA obligations, since "NEPA contains no exemptions for projects of national scope." *State of California v. Block*, 690 F.2d 753, 765 (9th Cir. 1982). In fact, the very national scope of a project makes the performance of an EIS more important, rather than less. The rule proposed by BLM would be a disaster for the states, gutting NEPA as well as FLPMA protections on precisely those federal programs with the potential for the widest possible economic and environmental consequences.

NEPA compels a federal agency to conduct an EIS whenever it proposes a "major Federal action[]

significantly affecting the quality of the human environment." 42 U.S.C. §4332. The importance of NEPA's action-forcing provision is twofold: it ensures that the agency will have sufficient information about every significant environmental impact of a proposed action, and it guarantees that the agency will inform the public that it has considered environmental concerns in its decisionmaking process. *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983). In addition, the EIS process offers states and other government bodies "adequate notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner." <sup>8/</sup>

An important component of the NEPA process is the "tiering" procedure set forth in the regulations implementing NEPA adopted by the Council on Environmental Quality (CEQ), *see* 40 CFR 1502.20; 1508.28 (1989).<sup>9/</sup> Tiering is designed to allow federal agencies to examine the environmental impacts of an large-scale program or plan (such as national program or policy statements) in broader impact statements,

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8. *Robertson v. Methow Valley Citizens Council*, 109 S.Ct. at 1846.

9. The regulations adopted by CEQ implementing NEPA are binding upon all federal agencies. 40 C.F.R. §§ 1500.3, 1507.1; *see also Andrus v. Sierra Club*, 422 U.S. 347, 358 (1979).

while focusing on the impacts of individual actions in subsequent, site-specific EISs. *See id.*

Agencies must comply with NEPA's statutory directives to the "fullest extent possible." <sup>10/</sup> This Court has explained that the language chosen by Congress "is neither accidental nor hyperbolic. Rather, [Congress] deliberate[ly] command[s] that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle." <sup>11/</sup>

**B. Judicial enforcement of the requirements of NEPA and FLPMA does not violate separation of powers principles.**

Petitioner argues in its brief that this case raises serious issues of separation of powers (Petitioner's brief at pages 36-37). This argument is a sham, based on a mischaracterization of the doctrine of separation of powers. This is not a case in which the courts are being asked to trespass upon the responsibilities of another branch of government, but a case in which they are being asked to carry out a function that is squarely and clearly assigned to the courts: assuring that federal

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10. *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787 (1976).

11. *Id.*

agencies obey the laws Congress has passed and carry out the duties Congress has assigned to them.

True separation of powers issues arise when the Court is asked to decide a political question, *see Baker v. Carr* 369 U. S. 186 (1962), or to make unauthorized forays into foreign relations that are committed solely to the other branches of government, *see* discussion in "The War Powers Doctrine and the Political Question Doctrine," 1977, 49 U.Colo.L.Rev. 65. But here, the petitioner has made no such allegation, and cannot do so, for no such issue or question is involved. Rather, what the petitioner asserts is that this case is nonjusticiable because it is large, difficult, complicated, and involves the administration of large amounts of land. Indeed, petitioner seems to argue that it is the size and complexity of the case that implicates the separation of powers doctrine; the number of acres involved, the volume of the record the district court must review, and the "overwhelming" size of the case that make the case somehow inappropriate for judicial resolution.

This has never been the rule enunciated by this Court. It simply cannot be the case that as the country grows and the responsibilities imposed on the government grow more complex, and the more people its actions affect, the courts lose jurisdiction to review the legality of the government's most important actions. In fulfilling their responsibility to resolve allegations that federal agencies are violating congressional

mandates, as well as in other spheres such as antitrust cases, courts handle huge records and complex and difficult cases every day. Cases involving highly technical issues of engineering, chemistry, statistics, and science are presented regularly to the courts under the Clean Air Act and Clean Water Act, as well as such statutes as the Comprehensive Environmental Response, Cleanup, and Liability Act (commonly called the "Superfund" law), and the courts are able to handle them.<sup>12/</sup> Similarly, the courts can and have performed admirably in the very case at bar in ensuring that the BLM has properly administered lands subject to the final decision in this case. The petitioner asks this Court to believe that the courts cannot do what they have successfully done in this case and others for years, and as a result to insulate the largest governmental decisions from review.

It is particularly disingenuous for petitioner to invoke the spectre of separation of powers questions here because, as the District Court found early on, this case raises essentially legal issues.<sup>13/</sup> BLM's portrayal of

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12. Clean Water Act, 33 U.S.C. §1251 *et seq.*; Clean Air Act, 42 U.S. §7401 *et seq.*; Comprehensive Environmental Response, Cleanup, and Liability Act, 42 U.S.C. §9601 *et seq.*

13. The lower court said: "The essence of plaintiffs' claim is legal: The exercise of agency discretion and expertise and the development of a factual record would not be helpful or necessary to

NEPA and FLPMA enforcement as judicial management of federal programs is wildly off-base. Contrary to its claims, respondents are not asking the federal courts to actually take over BLM's powers and responsibilities to manage federal lands. All NWF seeks in this action is to have BLM conduct a programmatic EIS, devise land use plans, and notify Congress and the states of its intentions before disposing of longstanding federal protections on federal lands. Opp. Br. Pet. 4. In light of the evidence in the record that many of these lands have environmental and recreational value, such a request is hardly unreasonable.

No management of federal programs is called for, nor would it be appropriate. As this Court pointed out in *Kleppe v. Sierra Club*:

"The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'" (427 U.S. 390, 410, n. 21 (1975)(citing *Natural Resources Defense Council v. Morton* 458 F.2d 827, 838 (US App DC 1972)).

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decide this legal issue." Pet. App. 142a.

No separation of powers principles are violated by the enforcement of NEPA and FLPMA. Congress specifically provided for public participation throughout the NEPA and FLPMA processes. NWF is seeking to enforce these rights. NWF is not seeking any review of statutes, or challenging any laws on Constitutional grounds. It is not seeking a radical reinterpretation of either NEPA or FLPMA. Its challenge of BLM's failure to comply with NEPA and FLPMA falls squarely in line with other state and public challenges to federal agency action on environmental grounds, as recognized by the District Court in originally granting the preliminary injunction, and by the Appeals Court in affirming the grant.

If this Court interprets the enforcement of NEPA and FLPMA as judicial management, states and other interested parties will be seriously hampered in demanding that federal agencies in the future comply with these procedures. Other courts will also regard as judicial management ordering a federal agency to perform an EIS or to draft a land use plan or to notify Congress. Without the ability to seek relief from the courts, EISs and the procedural opportunities they provide to states and the public would soon be a distant memory.

Amici States also note that petitioner's argument that this case would "overwhelm" the judicial capability ignores what would happen if its bizarre and overly restrictive standing doctrine were accepted by this Court. If indeed an environmental group must allege

and prove that an individual member has made specific and demonstrated use of each and every parcel of land affected by petitioner's nationwide program of revoking land withdrawals, the obvious response of environmental groups will be to accept the implied challenge issued by petitioner and file hundreds or even thousands of suits, each virtually identical in the statutory issues raised and the relief sought, but alleging specific harm to specific individuals for each and every parcel of land affected. Given the large number of federal programmatic decisions each year affecting thousands or millions of people, such a scenario would truly overwhelm the courts, not to mention the federal agencies and those defending them, with no advantage in sharpening the issues affecting the validity of the program as a whole or otherwise fulfilling the purposes of the standing doctrines.

Standing doctrines should not be used to exclude from judicial review cases that are not nonjusticiable, but merely hard. The courts are charged by the Constitution with deciding big cases as well as small ones, difficult and challenging cases as well as simple ones. Petitioner's argument on this point should be rejected by the Court.

### III

#### **PROCEDURAL INJURY UNDER NEPA OR FLPMA IS NOT THE EQUIVALENT OF INFORMATIONAL INJURY UNDER THE FREEDOM OF INFORMATION ACT ("FOIA")**

Petitioner argues that the NWF lacks standing to challenge the paucity of information and opportunity for public participation afforded by BLM in the land withdrawal program, stating that the NWF has not alleged that it ever sought information that petitioner refused to disclose. In that argument, petitioner invokes the standard for disclosure of information in the Freedom of Information Act, 5 U.S.C. § 552 (see petitioner's brief at pages 41-43), and then grafts that standard onto the FLPMA and NEPA issues that are presented in this case. Amici States are extremely disturbed that, some twenty years after the passage of NEPA, a federal agency could so misconstrue its duty under that statute. NEPA was not enacted for the benefit of historians. The standard for what petitioner calls "informational standing" would deprive not only respondents, but States and the general public of the information and the open and public decision-making process in decisions that affect the environment that make up the very heart of NEPA.

The generation and public dissemination of information on the environmental effects of major federal actions are the central purposes of NEPA. The statute is designed to ensure that federal agencies take a "hard look" at the environmental consequences of their actions, informing both themselves as decision-makers and the public as to those consequences. *Andrus v. Sierra Club*, 442 U.S. at 350. Preparation of an Environmental Impact Statement (EIS) ensures that agencies "will have available and will carefully consider detailed information concerning significant environmental impacts." *Robertson v. Methow Valley Citizens Council*, 109 S.Ct. at 1845. Moreover, it also "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Id.*

Petitioner claims, however, that so long as it is willing to open up its agency files to the public upon request, members of the public can claim no injury from its decisions. But NEPA and FLPMA are not the natural resources equivalent of the Freedom of Information Act ("FOIA"). Petitioner's analogy to FOIA, which may have been apt in the context of the open meeting law considered in *Public Citizen v. U.S. Department of Justice*, is therefore inapposite. NEPA is specifically intended to be "action-forcing"; it requires agencies to affirmatively analyze all potential environmental consequences of a project, and to present this information to the public, regardless of

whether the public asks for it. This "action-forcing" provision, and the public notice and review provisions of FLPMA, are hardly satisfied by turning over boxes of paper after agency decisions have already been made.

Nor is the provision of information alone sufficient to satisfy NEPA. NEPA requires more than just the disclosure of information; it mandates an open and public decision-making process of which environmental values are part and parcel. *See, Robertson* at 1845 : "[T]he requirement that agencies prepared detailed impact statements inevitably bring[s] pressure to bear on agencies 'to respond to the needs of environmental quality' [citations omitted]." The statute's implementing regulations make explicit the obligation of federal agencies to include the public in their decision making process. (*See* 40 C.F.R. § 1506.6 (1989).) As the Court has observed, publication of an EIS, both in draft and final form "provides a springboard for public comment." *Robertson* at 1845. Indeed, since no particular substantive result is required under NEPA (that is, a federal agency need not choose the most environmentally preferable alternative or action), it is this *process*, the generation of information, the full and complete disclosure of that information to the public, and the open decision-making process in which environmental values are required to be considered by the agency, that is the essence of NEPA. This process is what NEPA adds to federal decision-making, and to be deprived of it is to lose all the protection of the

statute that Congress intended to provide. *Commonwealth of Massachusetts, et al. v. Watt*, 716 F.2d 946 (1st Cir.1983).

Petitioner attempts to read out entirely this injury in fact which is caused by agency violations of NEPA: the loss of the opportunity to participate in the federal decision-making process, and the absence of the agency NEPA process in which environmental values are analyzed in detail. The affidavits of respondent clearly state such harm: they establish that individual members of NWF not only use and enjoy lands affected by the petitioner's program, but that these individuals have participated in administrative proceedings involving these lands in the past,<sup>14/</sup> and are likely to enter fully into the open decision-making process that NEPA guarantees. As for NWF itself, Lynn Greenwalt's affidavit demonstrates that the central purposes of the organization include providing its members the very kinds of information that NEPA requires, as well as representing its members in the decision-making process that NEPA provides. See, Affidavit of Lynn Greenwalt at paragraph 5.

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14. See affidavit of Richard Loren Erman at paragraphs 4 and 8, affidavit of Peggy Kay Peterson at paragraphs 4 and 8, and affidavit of Lynn A. Greenwalt at paragraphs 3 and 4 for specific allegations of both past participation in federal decision-making processes and interest in participating in the BLM decision at issue here.

The interest of amici States in the information and open procedures NEPA requires is not an academic one. It is States that most often must deal with the environmental consequences of federal action, whether on air quality, water quality, or use of land owned by the federal government. It is the States that must handle instream pollution caused by mine waste runoff, and it is States and their political subdivisions that must plan for roads to access newly opened and developing federal lands, for influxes of workers or new industry that will respond to changing land use, and for all the other consequences of the decisions that will flow from the cancellation of land withdrawals. Since States must accept these burdens, they must have access to full information on what they may expect to happen, and they must have access to the process of decision-making so that they may protect their citizens and their resources as much as possible. NEPA provides these rights, and amici States ask the Court to reaffirm them.<sup>15/</sup>

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15. As the Court recently observed: "With respect to a development. . .where the adverse effects. . .are primarily attributable to predicted off-site development that will be subject to regulation by other governmental bodies, the EIS serves the function of offering those bodies adequate notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner." *Robertson* at 1846.

To equate standing under FOIA with NEPA standing is a gross distortion of NEPA's purposes and to the long-standing and settled law under NEPA. The NEPA claims in respondent's suit have been ignored by petitioner. Amici States are concerned that this Court give to these claims the attention that they deserve, and that the Court continue its long tradition of protecting the NEPA rights of the general public and of the States.

## CONCLUSION

For the reasons stated above, the petition should be denied, and the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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## PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA }  
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On April 2, 1990, I served the within Brief of Amici Curiae in re: "Manuel Lujan, Jr. vs. National Wildlife Federation" in the United States Supreme Court, October Term, 1989, No. 89-640, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is  
true and correct.

Executed on April 2, 1990, at Los Angeles, California.

  
CE CE MEDINA